

JUDGING FEDERAL WHITE-COLLAR FRAUD SENTENCING: AN EMPIRICAL STUDY REVEALING THE NEED FOR FURTHER REFORM

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ABSTRACT

White-collar federal fraud sentencing has long been fraught with controversy and criticism. As a result, the U.S. Sentencing Commission's intensive multi-year examination of sentencing for fraud crimes generated tremendous interest among the Department of Justice, criminal defense organizations, the academy, and a wide-range of advocacy groups. In November 2015, the Commission's publicly announced proposed amendments became law without Congressional change. These amendments, while commendable in process and purpose, fall short of sorely needed reforms that would serve to realign white-collar fraud punishments with legitimate penal justifications. This Article portrays the recent historical tension between the Federal Sentencing Commission and federal judges, and presents the results of an original empirical study that demonstrates clearly the continuing need for significant reforms.

The Article begins by framing the problem of fraud sentencing within modern criminal law, and examines the statistical reality of economic crime sentencing since the 1980s, which has been increasingly characterized by downward departures from harsh recommend minimum sentences. It then details an original empirical study we conducted on 240 sitting federal and state judges, just as the new sentencing guideline amendments were passing untouched through Congress. This study presented judges with a realistic pre-sentence report for a multimillion-dollar economic crime, and asked judges to sentence the defendant. We found that a remarkable 75% of federal district court judges sentenced the defendant to the precise minimum sentence of a possible seven-year range. The study further compared the judges' sentences across judicial cohorts and evaluated the role of judges' individual sentencing philosophies, age, religion, and the political party of the appointing president. Despite a range of interesting differences in sentencing philosophy and self-reported attitudes found based on these factors, federal judges' overwhelming agreement regarding minimum sentencing largely transcended their other differences.

The Article considers the results of the study in the context of the revised guidelines as well as scholarly reform suggestions, and offers five specific proposals to reform the guidelines, beginning with significant cuts to the so-called "loss table" as well as the specific offense characteristics that frequently lead to near-nonsensical sentencing guidelines.

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INTRODUCTION

Let's play an easy word association game: "Bernie Madoff"—what comes to mind? We think for most it is likely some form of "massive fraud scheme."¹ The Assistant U.S. Attorney for

¹ Mr. Madoff's massive fraud scheme was described in the Government's Sentencing Memorandum as follows:

Defendant conceived and orchestrated a multi-billion dollar Ponzi scheme by which he defrauded thousands of investors, including individuals, non-profit organizations and for-profit institutions, who placed money directly or indirectly with his registered

the Southern District of New York prosecuting Madoff, Lisa A. Baroni, began her argument at the 2009 sentencing of Mr. Madoff this way:

This defendant carried out a fraud of **unprecedented** proportion over the course of more than a generation. For more than 20 years he stole ruthlessly and without remorse. Thousands of people placed their trust in him and he lied repeatedly to all of them. And as the court heard from all of the victims, in their words and in the letters, he destroyed a lifetime of hard work of thousands of victims. And he used the victims' money to enrich himself and his family, with an opulent lifestyle, homes around the world, yachts, private jets, and tens of millions of dollars of loans to his family, loans of investor's money that has never been repaid.²

Considering Bernie Madoff was seventy-one years old at the time of his sentencing, not even Rip Van Winkle would live long enough to serve Madoff's 150-year federal prison sentence.³ It was, in every real sense, a slow death sentence.⁴ Was Madoff's fraud scheme a death-worthy crime? Do other white-collar fraud offenders deserve prison sentences that can literally triple those of intentional (second-degree) murderers?⁵

The Federal Sentencing Guidelines for economic crimes, as well as U.S. Supreme Court jurisprudence on the role of judicial discretion in sentencing, have shifted consistently and rapidly since the 1980s, and the sentences of white-collar criminals have hung in the balance. In some eras, a simple fraud crime with a medium-to-high loss value might have been expected to culminate in a short sentence or probation, and yet, in current times, it could be expected to result in nearly a lifetime of incarceration. In this Article, we explore the evolution of white-collar criminal sentencing since the 1980s, including the November 2015 updated Fraud Guideline, examine the

broker-dealer and, later, registered investment advisory firm, Bernard L. Madoff Investment Securities ("BLMIS"). For more than two decades, Madoff solicited billions of dollars from investors under false pretenses, failed to invest such funds as promised, and misappropriated and converted investors' funds for his own benefit and the benefit of others. These criminal acts caused billions of dollars of losses to investors, drove many individuals and charitable organizations to economic collapse or near collapse, and visited especially significant non-economic, emotional damage on many of Madoff's victims.

Government's Sentencing Memo. at 3, U.S. v. Madoff, No. 1:09-cr-00213-DC (S.D.N.Y. 2009), ECF No.92.

There is no single definition of a Ponzi scheme, named for Charles Ponzi, who, in the late 1920s, was convicted for multiple fraud schemes in Boston. *Taneja v. First Tennessee Bank, National*, 2012 WL 3073175 (Bankr. E.D. Va. (2012) (collecting definitions). For a short definition of a Ponzi scheme *see, e.g., In re Bonham*, 229 F.3d 750, 759 (9th Cir. 2000) ("Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.").

² Sentencing Transcript at 39, U.S. v. Madoff, No. 1:09-cr-00213-DC (S.D.N.Y. 2009), ECF No. 100.

³ *Id.* at 32, 49.

⁴ Reporting of Madoff's Ponzi fraud scheme was widespread; indeed, if one puts his name in Google, more than 500,000 hits surface. *See* https://www.google.com/?gws_rd=ssl#q=bernie+madaff (12/10/2015 screen shot on file with the authors).

⁵ Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1053 (2001).

again-important role of the federal judge in sentencing, and present the results of a unique empirical study that tested how sitting federal and state judges sentence a fraud offender in the context of what one leading judge has called a “draconian approach to white-collar crime, unsupported by any empirical data.”⁶ The results of our study show that judges resist the harsh sentencing guidelines for today’s economic crimes, and do so in interesting ways. We build on this study and the history of economic crime sentencing to propose that sentencing guidelines should be fixed in five fundamental ways.

While major white-collar⁷ fraud schemes like Madoff, Enron (Jeff Skilling), Cedant (Walter Forbes), MF Global (Jon Corzine), WorldCom (Bernard Ebbers), Health South (Richard Scrushy), Tyco International (Dennis Kozlowsky), and Quest Communications (Joseph Nacchio)⁸ dominate the headlines, they do not reflect the daily gist of federal fraud prosecutions or offenders. Indeed, high value fraud cases are rare, and have likely garnered a lot more media and scholarly attention on a per-crime basis than perhaps any other individual offense. What is so special about these high-value economic crime cases that have made them the subject of societal focus and curiosity? Does this special attention extend to the way these crimes are handled by the Federal Sentencing Commission and federal judges?

To place high-value fraud cases in the proper perspective, we first review a brief history of federal sentencing and white-collar fraud in Section I. This review illustrates the ebb and flow of not only judicial discretion, as Congress and the U.S. Supreme Court have weighed in, but also a frequent and fervent march of revised Federal Sentencing Guidelines, which have sought to increasingly penalize white-collar offenders, particularly for high-value crimes. Section II builds on this history by examining the statistical reality of the sentencing of modern federal fraud prosecution data. This look at the data reveals that, as the guidelines have become harsher and crimes larger, judges regularly sentence economic criminals well below the minimum guideline in all but the tiniest of crimes. Section III describes the original empirical study we conducted of 240 sitting federal and state judges, representing all federal circuits and eight states. We found that three in four federal district court judges sentenced our study’s defendant to the exact minimum sentence possible (151 months) of a seven-year range. Furthermore, we found a variety of statistically significant results when comparing the cohorts of judges, ranging in topics from the type of judge (district court judge v. magistrate judge v. state court judge), to the political affiliation of the appointing President of the United States, to philosophy on retribution, to the age of the judge, to the reported religious affiliation of the judge. Section IV frames these results in the context of the 2015 amendment process of the U.S. Sentencing Commission concerning the

⁶ United States v. Gupta, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) (Jed S. Rakoff, J.).

⁷ Defining “white-collar” crime is no easy task. The now ubiquitous phrase was first coined in writing by path-breaking criminologist Edwin H. Sutherland in his book *White Collar Crime* in 1949. Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 827 (2014) (Sutherland defined “white collar” crime as “a crime committed by a person of respectability and high social status in the course of his occupation.”) (footnote omitted). Buell’s article also has a section on White Collar Offense Definition. *Id.*, at 841-46. Sutherland first used the phrase *orally* in a speech to the American Sociological Society in 1940, reprinted in Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940). See also, Ellen S. Podgor & Lucian E. Dervan, “*White Collar Crime*”: *Still Hazy After All These Years*, 50 GEORGIA L. REV. (forthcoming 2015) (Noting that “[S]everal commentators have discussed the struggle of providing a definition to what is encompassed within the term ‘white collar crime’ ...” and then providing an overview of various definitions).

⁸ See The 10 Biggest Frauds in Recent U.S. History, FORBES, <http://www.forbes.com/pictures/ghmf45hedh/1-enron/>.

§2B1.1 fraud guideline, which had been passed along to Congress at the time our study commenced, and details the criticism of the Task Force of the American Bar Association (“ABA”), as well as a leading sentencing guidelines scholar. Section V builds on both our study, as well as the 2015 amendments and its critiques, by making specific recommendations for additional reforms of the §2B1.1 fraud guideline. We urge five specific and realistic reforms the Commission should adopt to improve the fundamental fairness of the fraud guideline, beginning with significant cuts to the so-called “loss table” as well as the specific offense characteristics that frequently lead to near-nonsensical sentencing guidelines.

I. A BRIEF HISTORY OF FEDERAL SENTENCING, JUDICIAL DISCRETION, AND WHITE-COLLAR FRAUD CRIME

A historical look at federal white-collar sentencing from the 1980s to the present details a busy era characterized by multiple themes, specifically regarding the major players in federal white-collar law: Congress, the U.S. Supreme Court, individual sentencing judges, and the Federal Sentencing Commission. First, Congressional action has largely been defined by two major pieces of legislation, the Sentencing Reform Act of 1984 (“SRA”)⁹ and the PROTECT Act,¹⁰ that together have sought to harshen criminal penalties and restrict judicial discretion. Second, the U.S. Supreme Court has also played a remarkably active role, largely due to the restoration of the discretion of federal judges in sentencing, most recently in *Booker*¹¹ and *Gall*.¹² Next, individual judges have largely been perceived to be on the lenient side of white-collar federal sentencing, perhaps due to the likelihood that they empathize with white-collar defendants, and their historical role has frequently been in consistent departures from—or levying criticism against—the sentencing guidelines. Finally, the Federal Sentencing Commission, which has continually resisted criticism for its unannounced methods and overreliance on perhaps illogical sentencing enhancement, has substantially ramped up penalties for economic criminals to, at times, extreme levels.

A. *Sentencing Before the Sentencing Reform Act of 1984 and the Sentencing Guidelines*

Historically, the U.S. Constitution did not explicitly assign exclusive jurisdiction over federal sentencing to any one of the three branches of government.¹³ Of course, Congress “has the power to fix the sentence for a federal crime.”¹⁴ Yet, “Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected.”¹⁵ This grant of “broad discretion was further enhanced by the power later granted the judge to suspend the sentence and by the resulting growth of an elaborate probation system.”¹⁶ With the creation of parole, “Congress moved toward a ‘three-way sharing’ of

⁹ See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

¹⁰ See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

¹¹ *United States v. Booker*, 543 U.S. 220 (2005).

¹² *Gall v. United States*, 552 U.S. 38 (2007).

¹³ See *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

¹⁴ *Id.*

¹⁵ *Id.* at 365.

¹⁶ *Id.*

sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge.”¹⁷ Pursuant to this indeterminate sentencing scheme, Congress defined the maximum statutory sentence, the judge sentenced within the statutory range (which usually included probation as an option), and the Executive Branch’s parole system ultimately determined the precise length of imprisonment.¹⁸

In 1980, Yale Law Professor Stanton Wheeler and two colleagues published their study of lengthy interviews with fifty-one federal district court judges in seven judicial districts “including those with the heaviest ‘white-collar crime’ caseloads.”¹⁹ They were “struck by the fundamental tension many judges feel between the aims of general deterrence on the one hand, and the particular attributes of white-collar offenders on the other.”²⁰ White-collar defendants received “special empathy” because their position in society was more like the judge’s own position.²¹ The judges studied further believed that the collateral consequences of conviction: loss of prestigious jobs, professional licenses, status in their communities—satisfied the needs of punishment and sentencing.²² Just four years before Professor Wheeler’s study was published, noted sentencing reformer and harsh critic of judicial discretion, Judge Marvin Frankel,²³ ironically wrote in a

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 481 (1980).

²⁰ *Id.* at 499.

²¹ Daniel Richman, *Federal White-Collar Sentencing In The United State: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 55 (2013) (footnote omitted).

²² *See id.*, citing Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 482-84 (1980).

²³ Judge Marvin Frankel’s writings are considered to have “played a particularly influential role in the sentencing reform movement of the 1970s and 1980s.” Michael M. O’Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 325 n.77 (2005); Rose Duffy, *The Return of Judicial Discretion*, 45 IDAHO L. REV. 223, 227 (2008) (“Equitable concerns, like those of Judge Marvin Frankel, were the driving force behind the adoption of a more uniform sentencing system.”).

As Judge Marvin Frankel indicated in his influential book, *Criminal Sentences: Law Without Order*, allowing judges unfettered discretion results in disparity. Speaking of the sentencing practices of the 1970s, which left determining a sentence up to a judge, Judge Frankel described the difficulties of discretion with no guidance:

Our practice in this country, of which I have complained at length, is to leave that ultimate question [of how long or severe a sentence should be] to the wide, largely unguided, unstandardized, usually unreviewable judgment of a single official, the trial judge. This means, naturally, that intermediate questions as to factors tending to mitigate or to aggravate are also for that individual’s exclusive judgment. We allow him not merely to “weigh” the various elements that go into a sentence. Prior to that, we leave to his unfettered (and usually unspoken) preferences the determination as to what factors ought to be considered at all, and in what direction.

D. Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 85-86 (2007) (footnote omitted). For

federal sentencing opinion that imposing just a four-month prison sentence on an ordained rabbi who owned nursing homes and engaged in Medicare fraud “should be sufficiently frightening to serve the major end of deterrence. For all but the profoundly vengeful, it should not depreciate the seriousness of his offense.”²⁴

Prior to the passage of the SRA, “[w]hite collar offenders used to receive notoriously lighter sentences than street offenders in federal court.”²⁵ Alternatives to incarceration, like probation, fines, community service, and short terms of incarceration followed by early parole were common for white-collar offenders.²⁶ These readily available “lenient” alternatives for federal judges to lengthier incarceration “was one of the major motivations for Congress” to pass the SRA, “create the U.S. Sentencing Commission, which in turn promulgated the Federal Sentencing Guidelines.”²⁷ At the bottom, there were many in the sentencing reform movement who believed that “sentences for financial crimes had just been too lenient for too long.”²⁸

B. *The Sentencing Reform Act of 1984 and the Sentencing Guidelines*

1. *Introduction*

Since the guidelines went into effect in the fall of 1987, the U.S. Sentencing Commission has divided the post SRA and guideline regime into four eras for statistical purposes.²⁹ They are the *Koon*,³⁰ the PROTECT Act,³¹ the *Booker*,³² and the *Gall*³³ eras. Figure 1 below depicts a timeline of these four sentencing eras.

FIGURE 1.

further discussion of the federal sentencing reform movement that gave rise to the federal sentencing guidelines, *see also* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679, 680-92; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); and Kate Stith & Steve Y. Koh, *The Politics Of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

²⁴ *United States v. Bergman*, 416 F.Supp. 496, 502 (S.D.N.Y. 1976) (Marvin E. Frankel, J.).

²⁵ Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 833 (2014).

²⁶ *See id.*

²⁷ *Id.*

²⁸ *Id.* (footnote omitted).

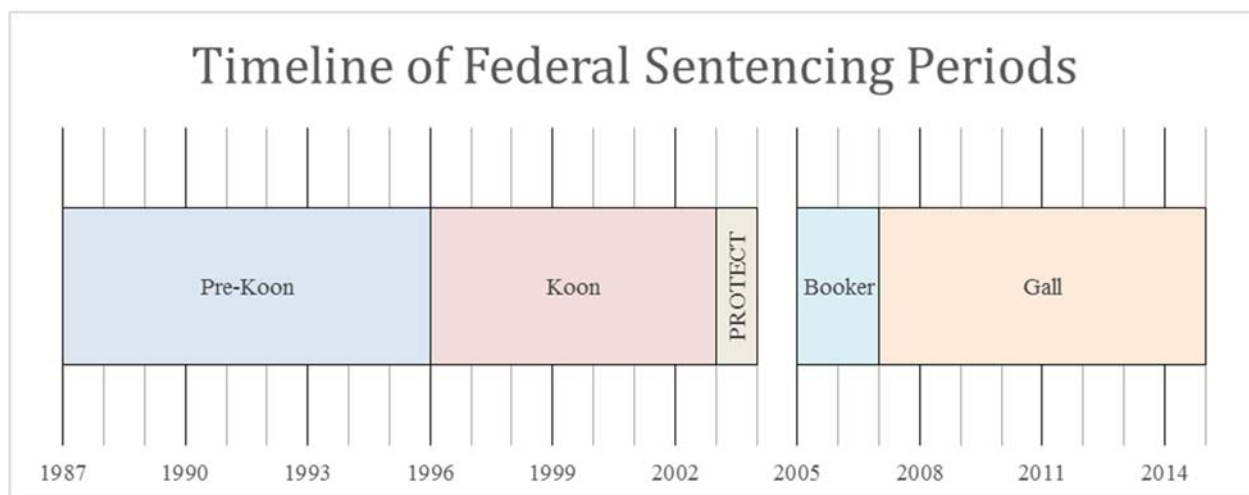
²⁹ *See* U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING PT. A 2-3 (2012) [hereinafter 2012 Sentencing Report].

³⁰ *See United States v. Koon*, 518 U.S. 81 (1996).

³¹ *See* PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

³² *See United States v. Booker*, 543 U.S. 220 (2005).

³³ *See Gall v. United States*, 552 U.S. 38 (2007).



2. *The Creation of the SRA and the Guidelines*

The Senate Report on the proposed SRA legislation is illuminating.³⁴ “The Report referred to the ‘outmoded rehabilitation model’ for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.”³⁵ The Report also “observed that the indeterminate-sentencing system had two ‘unjustifi[ed]’ and ‘shameful’ consequences.”³⁶ The first consequence “was the great variations among sentences imposed by different judges upon similarly situated offenders.”³⁷ The second alleged unjustified and shameful consequence “was the uncertainty as to the time the offender would spend in prison.”³⁸ Each was a serious impediment to an evenhanded and effective operation of the criminal justice system. The Report went on to note that parole was “an inadequate device for overcoming these undesirable consequences.”³⁹

However, before settling on and passing the mandatory-guideline system of federal sentencing, Congress considered and rejected “other competing proposals for sentencing reform.”⁴⁰ Congress rejected both strict determinate sentencing and an advisory guideline system.⁴¹ Congress settled on the mandatory guideline system because it felt that this system “would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case.”⁴²

The SRA, as adopted, changed the prior indeterminate sentencing scheme in five important ways described by the Court in *Mistretta*:

³⁴ See S.REP. NO. 98-225 (1983), U.S.Code Cong. & Admin.News 1984, p. 3182 (Report).

³⁵ *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (citing S.REP. NO. 98-225 (1983), U.S. Code Cong. & Admin.News 1984, p. 3182).

³⁶ *Id.* (citation omitted).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 367.

⁴¹ See *id.*

⁴² *Id.*

1. It rejects imprisonment as a means of promoting rehabilitation,⁴³ and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals.⁴⁴
2. It consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission.⁴⁵
3. It makes all sentences basically determinate. A prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in custody.⁴⁶
4. It makes the Sentencing Commission's guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating the guidelines.⁴⁷ The Act also requires the court to state its reasons for the sentence imposed and to give "the specific reason" for imposing a sentence different from that described in the guideline.⁴⁸
5. It authorizes limited appellate review of the sentence. It permits a defendant to appeal a sentence that is above the defined range, and it permits the Government to appeal a sentence that is below that range. It also permits either side to appeal an incorrect application of the guideline.⁴⁹

Thus, the guidelines were created

to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors, 'among others.' The maximum of the range ordinarily may not exceed the minimum by more than the greater of 25% or six months, and each sentence is to be within the limit provided by existing law.⁵⁰

Noted sentencing expert Judge Jack B. Weinstein wrote: "In 1984, Congress passed the Sentencing Reform Act and created the United States Sentencing Commission to help deal with uncertainties and disparities in the federal criminal justice system."⁵¹ After the passage of the SRA

⁴³ *Id.* (citing 28 U.S.C. § 994(k)).

⁴⁴ *Id.* (citing 18 U.S.C. § 3553(a)(2)).

⁴⁵ *Id.* (citing 28 U.S.C. §§ 991, 994, and 995(a)(1)).

⁴⁶ *Id.* (citing 18 U.S.C. §§ 3624(a) and (b)).

⁴⁷ *Id.* (citing §§ 3553(a) and (b)).

⁴⁸ *Id.* (citing § 3553(c)).

⁴⁹ *See id.* at 367-68 (citing §§ 3742(a) and (b)).

⁵⁰ *Id.* at 368 (citation omitted).

⁵¹ *United States v. Handy*, 570 F. Supp. 2d 437, 443 (E.D.N.Y. 2008) (Jack B. Weinstein, J.). Judge Weinstein cited Judge Frankel's work, Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 247 (1984), to support that passage.

and the effective date of the guidelines in the fall of 1987, there were less major seismic shifts on the federal sentencing Richter scale preceding the *Booker* revolution and the *Gall* decision.⁵²

3. Koon and the PROTECT Act

The *Koon* period, from 1996 to 2003, reflected the decision in *United States v. Koon*⁵³ “that district court departure decisions under the Guidelines were entitled to deference on appeal by adopting an abuse of discretion standard of review and rejecting a *de novo* standard.”⁵⁴ Seven years later, seeking to restrict judges’ departures under the guidelines in the post-*Koon* era, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT Act”).⁵⁵ The purpose of the PROTECT Act was to restrict “the use of departures by sentencing courts and change[] the standard of review for departures to *de novo*.”⁵⁶ Thus, the perennial tug-of-war surrounding the boundaries of judicial discretion continued.

4. Booker Guideline Sentencing—the Current Federal Sentencing Regime

The limitations of judicial discretion inherent in the PROTECT Act did not last long. In 2005, *United States v. Booker* ushered in a federal sentencing revolution by declaring the U.S. Sentencing Guidelines unconstitutional and creating a constitutionally saving remedy of making the guidelines advisory rather than mandatory.⁵⁷ The so-called *Booker* revolution marked the Maginot line between the mandatory sentencing guideline regime and the new post-*Booker* advisory guideline sentencing scheme.⁵⁸ *Booker*, in short, held the U.S. Sentencing Guidelines

⁵² The U.S. Sentencing Commission itself has used these four periods: *Koon*, the PROTECT Act, *Booker*, and *Gall* to discuss their data. See 2012 Sentencing Report, *supra* note 29.

⁵³ 518 U.S. 81 (1996).

⁵⁴ Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases In Federal Sentencing: a Modest Solution For Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 512 (2014); see also *Koon*, 518 U.S. at 96-100.

⁵⁵ See Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁵⁶ Bennett, *supra* note 54, at 512 (footnote omitted).

⁵⁷ See *United States v. Booker*, 543 U.S. 220 (2005). The following two paragraphs are reproduced, nearly verbatim, from a prior writing of the first author. See Bennett, *supra* note 54, at 513-14 (footnotes omitted).

⁵⁸ Actually, the seeds of the post-*Booker* sentencing revolution were sown in the somewhat obscure case of *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the Supreme Court interpreted a federal carjacking statute, 18 U.S.C. § 2119 (Supp. V 1988), to define three separate offenses rather than a single offense with potentially three different maximum sentences triggered by aggravating factors that were not found by a jury. *Id.* at 251–52. This interpretation avoided the potential due process and Sixth Amendment constitutional issues identified by the Court. *Id.* at 239–52. The following year, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court answered the question raised, but not decided, in *Jones* and held:

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 490. Then, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court extended the *Apprendi* rationale to invalidate a state mandatory sentencing regime because the Sixth Amendment right to a jury trial prohibited a state sentencing judge from enhancing a criminal sentence three years above the fifty-three-month maximum sentence based on facts not decided by a jury or admitted by a

unconstitutional (under the Court’s previous *Apprendi-Blakely* rationale⁵⁹) because the sentencing judge enhanced Freddie Booker’s sentence beyond the 262-month sentence he could have imposed (based on facts the jury found beyond a reasonable doubt) to 360 months based on facts the judge found by a preponderance of the evidence.⁶⁰

The *Booker* remedy did two things. First, it severed and excised the provision of the SRA that made the U.S. Sentencing Guidelines mandatory and binding on federal judges, 18 U.S.C. § 3553(b)(1).⁶¹ The Court noted that, had Congress made the U.S. Sentencing Guidelines advisory rather than mandatory, the SRA would fall “outside the scope of *Apprendi*’s requirement.”⁶² Second, the Court severed and excised 18 U.S.C. § 3742(e), which “sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range.”⁶³ Thus, *Booker* made clear that mandatory guidelines violated the Sixth Amendment right to trial by jury by extending the Court’s prior holdings in *Apprendi* and *Blakely* to the U.S. Sentencing Guidelines.⁶⁴ Thus, the Court answered the first question presented in the case—“Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant”—in the affirmative.⁶⁵ The second part of *Booker*, the remedial portion, held that the proper remedy for the Sixth Amendment violation was to make the guidelines advisory by severing two provisions that made the guidelines mandatory.⁶⁶

5. *The Overlay of Gall on the Booker Advisory Guidelines*

Two years later, the U.S. Supreme Court decided *Gall v. United States*.⁶⁷ In *Gall*, the Court explained that trial court judges are “in a superior position to find facts,” determine the credibility

defendant, in this case, that Ralph Howard Blakely acted with deliberate cruelty. *Id.* at 298, 313–14. *Blakely*, thus, refined the *Apprendi* rule by holding:

In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority.

Id. at 303–04 (citation omitted). “*Blakely* made *Booker*’s constitutional holding all but inevitable . . .” Scott Michelman & Jay Rorty, *Doing Kimbrough Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1093 (2012).

⁵⁹ See *supra* note 58 and accompanying text.

⁶⁰ See *Booker*, 543 U.S. at 227, 243–44.

⁶¹ See *id.* at 258–59.

⁶² *Id.* at 259.

⁶³ *Id.* (citation omitted).

⁶⁴ See *id.* at 243–44.

⁶⁵ *Id.* at 229 n.1.

⁶⁶ See *id.* at 245.

⁶⁷ See 552 U.S. 38, 41 (2007). The remainder of this paragraph is a nearly verbatim description of *Gall* written by the lead author of this Article, Mark W. Bennett. See Bennett, *supra* note 54, at 517 (footnotes omitted).

of the witnesses, apply the § 3553(a) factors, and “gain[] insights not conveyed by the record.”⁶⁸ Quoting from its earlier opinion in *Koon*, the Court emphasized the historic role of a federal sentencing judge:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.⁶⁹

The Court further observed, “[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable.”⁷⁰ Rather, under the more deferential “abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court’s reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.”⁷¹ Thus, *Gall* swung the pendulum back toward judicial discretion, and gave federal sentencing judges wider discretion to apply the § 3553(a) factors and to achieve the overarching principle of federal sentencing that every federal district court judge “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing.⁷²

The § 3553(a) factors include, *inter alia*, the “nature and circumstance of the offense;” the “history and characteristics of the offense; the need to: “reflect the seriousness of the offense,” “promote respect for the law,” “to provide just punishment;” “to afford adequate deterrence;” “to protect the public from further crimes by the defendant;” and “to avoid unwarranted sentencing disparity...”⁷³

C. White-Collar Sentencing Pre and Post Booker

The leniency expressed by the federal sentencing judges in white-collar crimes discussed by Professor Stanton Wheeler and two colleagues in their 1980 article *Sentencing The White-Collar Offender* proved to be an impetus not only for the passage of the SRA, but for harsh punishment in the initial setting of the fraud guideline.⁷⁴ The Senate Report indicated that too

⁶⁸ *Id.* (quoting Brief Amici Curiae of Federal Public & Community Defenders & National Ass’n of Federal Defenders in Support of Petitioner at 16, *Gall*, 552 U.S. 38 (No. 06-7949)).

⁶⁹ *Id.* at 52 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

⁷⁰ *Id.* at 59.

⁷¹ *Id.* at 59–60.

⁷² 18 U.S.C. § 3553(a) (2012).

⁷³ 18 U.S.C. § 3553(a).

⁷⁴ See Daniel Richman, *Federal White-Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 55 (2013); Mark H. Allenbaugh, “*Drawn From Nowhere*”: A Review of the U.S. Sentencing Commission’s White-Collar Sentencing Guidelines and Loss Data, 26 FED. SENT’G REP. 19, 19 (2013) (“Just over twenty-five years ago, when assigned the task of developing the initial set of sentencing guidelines, the new U.S. Sentencing Commission began by compiling data on 10,000 federal sentences, from which it sought to build a comprehensive picture of past sentencing practices. After reviewing these data, the Commission decided that sentences for white-collar offenses had historically been too low compared to so-called “street crimes” involving similar economic losses. Accordingly, the Commission intentionally crafted the initial set of guidelines to require more severe punishment, and more frequent use of imprisonment, than had historically been the case for typical white-collar offenses.”) (footnote omitted).

many white-collar offenders were given probation “without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance.”⁷⁵

The fraud guideline that emerged was driven by economic “loss” “that judges were charged with calculating, a task that turned out to be enormously complex, challenging courts to devise methodologies for calculating ‘intended’ or ‘actual’ loss and, sometimes, gain.”⁷⁶ Moreover, unlike the guideline penalties for most other offenses that *allegedly* used pre-guideline empirical data developed by the initial Sentencing Commission, economic crime guidelines were ratcheted up over this prior judicial sentencing data.⁷⁷ In effect, the Commission equalized the white-collar fraud offenses with blue-collar theft offenses.⁷⁸ However, noted expert and scholar on the guidelines, Professor Frank O. Bowman III, observed: “Even so, to many observers, economic crime sentences still appeared quite low, both by comparison with sentences imposed for other offenses (particularly narcotics), and as a measured by their moral seriousness and the damage they inflict on society.”⁷⁹

Thus, “[t]he upward ratchet of the Guidelines for economic crimes began at the beginning – with the initial set of Guidelines.”⁸⁰ The original fraud guideline, U.S.S.G. § 2F1.1 (1987), was designed by the Sentencing Commission to alter the pre-guideline status quo of frequent probation to ensure that a much higher percentage of white-collar offenders received terms of incarceration.⁸¹ At least some of this initial adjustment may well have been a necessary step, if the goals for the ratchet were to counteract the extra empathic connection that federal judges felt with these specific defendants.⁸²

⁷⁵ S. REP. NO. 98-225, at 91-92 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3274-75.

⁷⁶ Richman, *supra* note 74, at 56 (footnote omitted).

⁷⁷ See James E. Felman, *The Need to Reform the Federal Sentencing Guidelines for High-Loss Economic Crimes*, 23 FED. SENT’G REP. 138, 138 (2010). We use the term *allegedly* because, while the Sentencing Commission did examine presentence reports from 10,000 prior cases to help determine the initial guideline ranges, they inexplicably deleted from their calculations the 50% of offenders who received probation – thus, in our view, rendering their claim that the guidelines are empirically-based fraudulent. See Mark Osler & Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUSTICE 117, 140-41 (2014) (“The Sentencing Commission claimed that it reviewed 10,000 pre-sentence reports from fiscal year 1984 and 100,000 cases from the computerized files of the U.S. Administrative Office from 1983 to 1985 (not just drug cases, but all types of criminal cases). Even though the Sentencing Commission farmed this data, it immediately, and arbitrarily, without explanation then or now, jettisoned the nearly 50% of federal sentences where a defendant was given probation—thus hijacking realistic data from prior federal sentencing practices. To make matters worse, the Sentencing Commission abandoned the empirical approach of prior sentences, even with the skewed data of eliminating cases with probation, for a new, significantly harsher approach.”) (footnote omitted).

⁷⁸ See Alan Ellis, John R. Steer & Mark H. Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economics Offenses*, 25 CRIMINAL JUSTICE 22, 34, 36 (2011).

⁷⁹ Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 1, 29 (2001).

⁸⁰ Felman, *supra* note 77, at 138 (2010).

⁸¹ See Frank O. Bowman III, *Damp Squib: The Disappointing Denouement Of The Sentencings Commission’s Economic Crime Project (And What They Should Do Now)*, 27 FED. SENT’G REP. 270, 271 (2015).

⁸² Indeed, there are reasons to believe that empathy is not felt equally for all types of defendants. Various neuropsychological and social psychological studies have demonstrated that people display much

It took the Commission only two years, however, before they raised the penalties “for economic crimes through a new loss table.”⁸³ However, these initial sentences for white-collar fraud cases, while more severe than prior to the passage of the SRA and the guidelines, were a mere harbinger for the far more severe guideline ranges for white-collar crimes to come.⁸⁴ In the initial fraud guideline, the amount of the loss could only increase the sentencing range fivefold—under the current fraud guideline that increase is nearly fortyfold.⁸⁵ The highest loss in the original loss table was only \$5 million dollars and this original fraud guideline contained only one specific offense characteristic (SOC) enhancement of 2 levels for more than minimal planning (and a few other factors).⁸⁶ Thus, the maximum guideline range for a first-time offender under this original fraud guideline resulted in a guideline sentencing range of 30-37 months.⁸⁷ Just two years later, the Sentencing Commission increased the loss table by several levels and the highest loss in the loss table went from \$5 million to \$80 million—increasing the sentencing range from 30-37 months to 51-63 months—without adding any other SOC.⁸⁸ By 2000, the Commission added 16 SOC to the fraud guideline other than loss amount—an increase of 15 over the original fraud guideline.⁸⁹ Increases also followed the Commission’s Economic Crime Package of 2001 and the 2002 passage of the Sarbanes-Oxley Act.⁹⁰ The Economic Crime Package was “a group of

different empathic responses when harm is imposed upon in-group members as opposed to out-group members. For example, in a study of affective empathy, researchers using functional Magnetic Resonance Imaging found that Chinese and Caucasian participants exhibited different brain region reactions when watching in-group and out-group members in pain. See Xiaojing Xu et al., *Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses*, 29 J. NEUROSCIENCE 8525, 8525-27 (2009). Participants who watched in-group members experience pain produced empathetic brain responses, but did not have the same empathetic response when watching out-group members experience pain. *Id.* Another study found that white participants experienced greater skin conductance responses when they watched white people in pain than when they watched African people in pain. Matteo Forgiarini et al., *Racism and the Empathy for Pain on Our Skin*, 2 FRONTIERS IN PSYCHOL. 1, 1 (2011). The researchers also connected these results to implicit racial bias, finding that the more implicit racial bias a participant showed, measured using an Implicit Association Test, the more likely they were to display a race-based empathetic response bias in favor of white people. *Id.*

If federal judges indeed feel as though they have traits in common with white-collar defendants, the above research would predict that the unequal empathic response could have sentencing consequences. See Robert J. Smith et. al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 871 (2015) (discussing the automatic associations of positive stereotypes and attitudes with white Americans, and how this leads to implicit white favoritism in criminal law).

⁸³ Felman, *supra* note 77, at 138.

⁸⁴ See Ellis et al., *supra* note 78, at 36.

⁸⁵ See Mark H. Allenbaugh, “*Drawn From Nowhere*”: A Review of the U.S. Sentencing Commission’s White-Collar Sentencing Guidelines and Loss Data, 26 FED. SENT’G REP. 19, 19 (2013).

⁸⁶ See Bowman, *supra* note 81, at 271.

⁸⁷ See *id.* That is without any Chapter 3 adjustments or acceptance of responsibility. *Id.* at n. 9.

⁸⁸ See *id.* at 271.

⁸⁹ See *id.*

⁹⁰ See U.S. SENTENCING COMM’N, REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 74 (2006); see also Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), Pub. L. No. 107-204, 116 Stat. 745 (2002). Among other matters, Section 903 of Sarbanes-Oxley increased the maximum sentences for mail and wire fraud from five years to twenty.

amendments to guidelines governing the sentencing of economic crimes” that the Commission approved in April of 2001.⁹¹

One noted commentator on federal sentencing observed: “beginning in 1988, the Commission tweaked the theft and fraud guidelines nearly annually.”⁹² Moreover, in “fairly typical” high loss fraud cases, the guideline range, due to the many enhancements adopted by the Commission, can often produce a guideline range equal to first degree murder and three times longer than “second-degree murder—which is still an intentional killing of a human being, with malice aforethought...”⁹³

As one of the leading experts on federal sentencing, Professor Douglas Berman, has pointed out, the “federal fraud guidelines have long had many critics among judges and commentators.”⁹⁴ Indeed, the nearly continuous harshening of white-collar sentencing guidelines has generated significant pushback evident in numerous judicial opinions. Federal judges have referred to the fraud guidelines as “a black stain on common sense;”⁹⁵ “patently unreasonable” and “so run amok that they are patently absurd on their face;”⁹⁶ “of no help;”⁹⁷ and both “fundamentally flawed” and “valueless.”⁹⁸

Judge Jed S. Rakoff, who sits in the epicenter of security fraud cases (the Southern District of New York), and is a leading expert on the fraud guidelines, commented in a recently high profile securities fraud sentencing opinion that “the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology—thus maximizing the risk of injustice.”⁹⁹ Judge Rakoff went on to observe that the current guideline calculations in white-collar fraud cases “are no longer tied to the mean of what federal judges had previously imposed for such crimes, but instead reflect an ever more draconian approach to white-collar crime, unsupported by any empirical data.”¹⁰⁰ We submit that Judge Rakoff was too kind in this observation, because as we

⁹¹ Frank O. Bowman III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 1, 7 (2001) (This comprehensive article details the history of the economic crime package and its effect on the federal sentencing guidelines).

⁹² Frank O. Bowman III, *Pour Encourager Les Autres? The Curious History And Distressing Implications Of The Criminal Provisions Of The Sarbanes-Oxley Act And The Sentencing Guidelines Amendments That Follow*, 1 OHIO ST. J. CRIM. L. 373, 387 (2004) (“In 1989, the Commission amended the loss table to increase sentences for defendants causing loss greater than \$40,000. In ensuing years, it added an array of specific offense characteristics and passed numerous amendments in an attempt to clarify the reach of the troublesome term “loss.” The lush thicket of amendments had two basic effects. First, the table modification, as well as virtually all of the new specific offense characteristics and definitional alterations to the loss concept, tended to increase guideline sentence levels for economic offenders. Second, the proliferating amendments made these guidelines increasingly complex and ever more difficult to apply.”) (footnote omitted).

⁹³ Parker & Block, *supra* note 5, at 1053.

⁹⁴ Douglas A. Berman, *Fiddling with the Fraud Guidelines as Booker Burns* (Editors Observations), 27 FED. SENT’G REP. 267 (2015).

⁹⁵ *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) (Fredric Bock, J.).

⁹⁶ *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (Jed S. Rakoff, J.).

⁹⁷ *United States v. Watt*, 707 F. Supp. 2d 149, 151 (D. Mass. 2010) (Nancy Gertner, J.).

⁹⁸ *United States v. Corsey*, 723 F.3d 366, 377 (2nd Cir. 2013) (U.S. District Judge Stefan R. Underhill, J. sitting by designation).

⁹⁹ *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012).

¹⁰⁰ *Id.*

pointed out earlier, the guidelines in their inception decapitated the fifty-percent of pre-guidelines cases that gave probation from the setting of the original guideline ranges.¹⁰¹ Thus, they were never tied to the mean—and the Commission has never publicly explained this.¹⁰² By way of example, Judge Rakoff explains that a typical fraud case in 1987 would produce a guideline range of 30-37 months but, by 2003, that identical fraud case was ratcheted up to 151-188 months, a staggering increase of more than 500%.¹⁰³ Judge Rakoff asks an insightful question: “Was such a crime really 500% worse in 2003 than it was in 1987?”¹⁰⁴ Of course not.

In their seminal book on the federal sentencing guidelines, Judge Jose Cabranes and Professor Kate Stith criticized the guidelines’ approach of relying so heavily on tying the length of a sentence to quantifiable difference in harm.¹⁰⁵ They wrote: “Unfortunately, the Sentencing Commission has nowhere stated, much less explained, why the quantifiable differences in harm caused are appropriate measurements of the extent of individual culpability, or why they are more significant than other sentencing factors that receive less weight in guidelines sentencing calculations.”¹⁰⁶ The authors give a prime example of their criticism: “Why, for instance, should the bank robber who is handed a bag containing \$5,000 be punished differently from the bank robber who happens to be handed a bag containing \$15,000?”¹⁰⁷ Cutting even more sharply to the quick they write: “Indeed, the Commission has never explained the rationale underlying *any* of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.”¹⁰⁸ Thus, because of the Commission’s preoccupation and reliance with “quantifiable characteristics,” the guidelines short shrift both mitigating and aggravating factors relative to both culpability and harm.¹⁰⁹

In the arc of just two decades, federal sentencing in general, and white-collar sentencing in particular, has come nearly full circle. It has evolved from virtually unlimited pre-SRA and guideline sentencing discretion, to extremely limited sentencing discretion under the SRA and guidelines, to post *Booker* and *Gall* sentencing that emphasizes the objective nature of the guidelines tempered and infused by the more discretionary nature of the § 3553(a) sentencing factors. This results in the current sentencing regime where the overarching sentencing principle is reasonableness.¹¹⁰

The evolution of action by Congress, the Sentencing Commission, and the courts has, thus, resulted in the restoration of judicial discretion in federal white-collar sentencing. However, the starting point for such sentencing has shifted drastically during this same period, with massive sentence range recommendations sometimes awaiting many economic criminals. Individual trial judges and commentators have put up scholarly resistance, but without analyzing aggregate data

¹⁰¹ See Osler & Bennett, *supra* note 77, at 140-141.

¹⁰² See *id.*

¹⁰³ See *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) (citation omitted).

¹⁰⁴ *Id.*

¹⁰⁵ See KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 69 (1998).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., *Kimrough v. United States*, 552 U.S. 85, 111 (2007) (“The ultimate question in *Kimrough*’s case is ‘whether the sentence was reasonable—*i.e.*, whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of [15 years] and justified a substantial deviation from the Guidelines range.’”).

on actual fraud sentencing or empirically examining how judges respond to the same type of case, it is difficult to make conclusions about how and whether judges actually deviate from the harsh sentencing guidelines. In the following section, we therefore report and consider such sentencing data through 2014, paying special attention to sentencing discretion in white-collar crimes with multimillion-dollar damages. In Section III, we then turn to the empirical study we conducted, which examined 240 sitting federal and state judges' sentences in a white-collar fraud case with multimillion-dollar harm and a long recommended sentence.

II. A LOOK AT FEDERAL FRAUD OFFENDER SENTENCING DATA

The post-*Booker* and *Gall* restoration of judicial discretion reignited the need to analyze and understand judicial decision-making in white-collar sentencing. Here, we begin to do that by reviewing U.S. Sentencing Commission data that paint a detailed picture of fraud frequency, federal sentencing, and judicial discretion in modern white-collar fraud jurisprudence. Our review indicates that, over time, the number of federal fraud convictions has increased, the average dollar amount for these crimes has increased, and, perhaps most importantly, the gap between the average minimum sentence and actual sentence rendered has also increased.

A. *Overview of Offenders Sentenced to the U.S. Sentencing Fraud Guideline – 2014 Data*¹¹¹

In fiscal year 2014, 8,216 offenders were sentenced under the basic economic offenses U.S. Sentencing Guideline §2B1.1 (“fraud guideline”).¹¹² This accounted for 12.1% of all offenders sentenced under the guidelines in federal court that year.¹¹³ Most offenders sentenced under this guideline were male (66.5%); 44.7% were White, 32.3% Black, 16.1% Hispanic and 6.9% were other races.¹¹⁴

The average age of an offender sentenced under §2B1.1 in FY 2014 was 43 years old.¹¹⁵ These offenses were overwhelming committed by U.S. citizens (88.8%).¹¹⁶ The vast majority of offenders sentenced under §2B1.1 were first offenders or had little criminal history because 71.4% were assigned a guideline Criminal History Category I, the lowest criminal history score under the guidelines.¹¹⁷

While large fraud schemes like Bernard Madoff’s infamous Ponzi scheme immediately come to mind, in fact, in FY 2014, 81.6% of the 8,216 §2B1.1 offenses involved less than one

¹¹¹ The formal title of §2B1.1 is: Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2015).

¹¹² See U.S. SENTENCING COMM’N, QUICK FACTS: THEFT, PROPERTY DESTRUCTION, AND FRAUD OFFENSES (2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Theft_Property_Destruction_Fraud_FY14.pdf.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

million dollars and slightly over half (50.4%) involved \$120,000 or less.¹¹⁸ However, that leaves 1512 offenders who were sentenced under the fraud guideline with more than one million dollars in loss—more than 18% of all offenders sentenced pursuant to the fraud guideline in FY 2014. The average length of sentence for the 8,216 offenders sentenced in FY 2014 was 24 months.¹¹⁹ Nearly a third were given probation (29.9%).¹²⁰

B. Overview of Trends for Offenders Sentenced Pursuant to §2B1.1

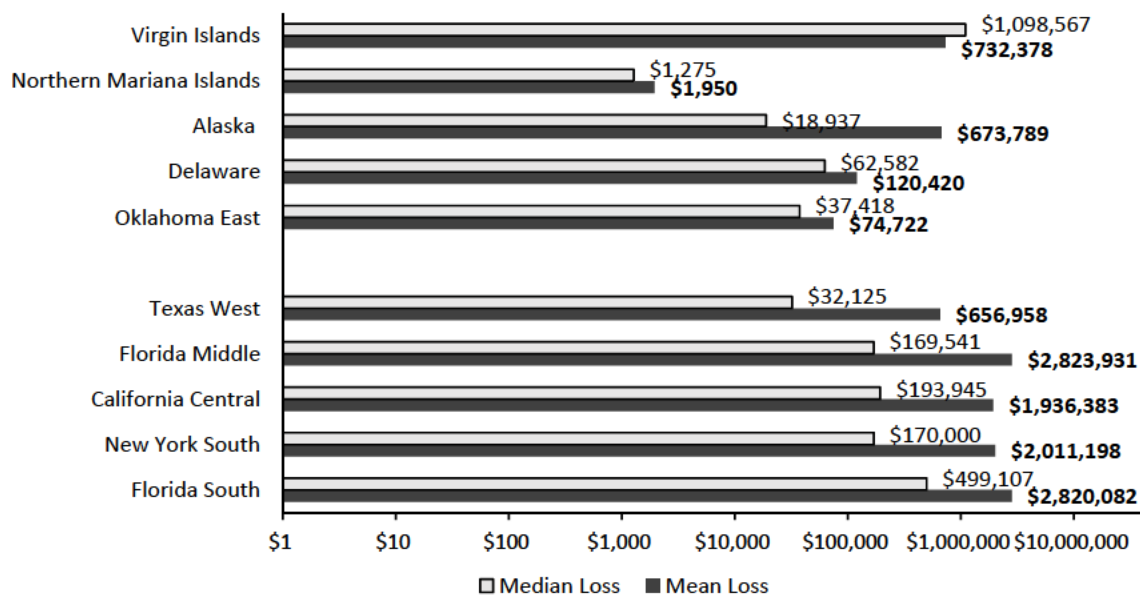
¹¹⁸ See *id.* This is exemplified by the data represented in the following table and graph. Note that with the exception of the Virgin Islands, the other nine federal judicial districts represented reported an average median loss value of a mere \$131,659 in 2012.

Number of § 2B1.1 Cases in Each Federal Judicial District with Mean and Median Loss Amounts in FY 2012

Rank		Number	Percent	Mean Loss	Median Loss
1	Florida South	490	5.8%	\$2,820,082	\$499,107
2	New York South	309	3.6%	\$2,011,198	\$170,000
3	California Central	274	3.2%	\$1,936,383	\$193,945
4	Florida Middle	274	3.2%	\$2,823,931	\$169,541
5	Texas West	255	3.0%	\$656,958	\$32,125

90	Oklahoma East	18	0.2%	\$74,722	\$37,418
91	Delaware	17	0.2%	\$120,420	\$62,582
92	Alaska	9	0.1%	\$673,789	\$18,937
93	Northern Mariana Islands	6	0.1%	\$1,950	\$1,275
94	Virgin Islands	3	0.0%	\$732,378	\$1,098,567

§ 2B1.1 Mean and Median Loss Amounts for
Top and Bottom 5 Most and Least Numerous Districts FY2012



¹¹⁹ See U.S. SENTENCING COMM'N, *supra* note 112.

¹²⁰ See *id.*

1. Number of Fraud Offenders Increased

The number of offenders sentenced under §2B1.1 has, over the decade from 2003-2012, increased by 34.3%.¹²¹ Yet, the percentage of fraud offenders compared to all offenders in each year remained consistent at approximately 11% of the federal offenders sentenced during this decade.¹²²

2. Average Guideline Increase Outpaces Minimum Sentence Increase

Over the same decade, the average guideline minimum for an offender increased from 10 months to 29 months.¹²³ The average sentence increased from 10 months to 22 months—increases of 190% and 120%, respectively.¹²⁴ Thus, the actual length of sentence increased at a slower rate than the increasing minimum guideline. *See* Figure 2 below. Furthermore, the statistics more broadly demonstrate that the *average* sentence has not even reached that of the *minimum* guideline since 2004. In fact, from 2009-12, the average guideline minimum increased six months, yet the average sentence length increased only two months, indicating clearly that, while sentences became stiffer, judges have been choosing not to keep up.¹²⁵

FIGURE 2.¹²⁶

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM FOR § 2B1.1 OFFENDERS
(FISCAL YEARS 2003-2012)

¹²¹ *See* U.S. SENTENCING COMMISSION, SENTENCING AND GUIDELINE APPLICATION INFORMATION FOR §2B1.1 OFFENDERS 1 (2013). In FY 2003, the number of offenders sentenced under § 2B1.1 was 6,332, compared to 8,507 offenders sentenced under § 2B1.1 in FY 2012. *Id.* at 1, Figure 1. Of the 769,466 cases, 101,622 were excluded due to incomplete guideline application information. *Id.* Of the 667,844 remaining cases, 591,882 were excluded that were not sentenced under § 2B1.1. *Id.* Of the remaining 75,962 cases sentenced under § 2B1.1, 1,112 were excluded that were sentenced using a Guidelines Manual in effect prior to November 1, 2001. *Id.*

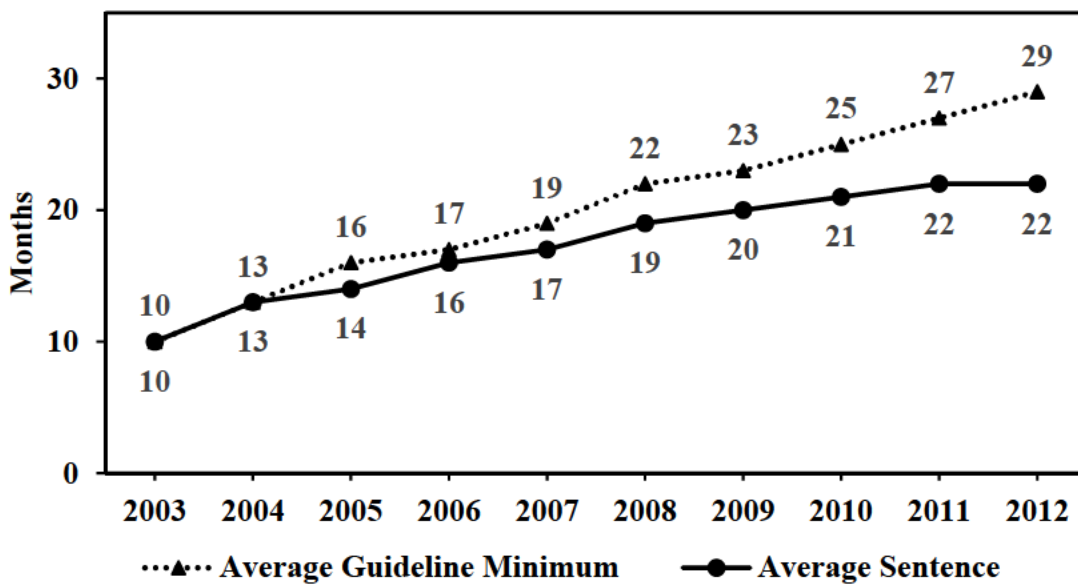
¹²² *See id.*, at 1.

¹²³ *See id.*, at 3.

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *Id.* Of the 769,466 cases, 101,622 were excluded due to incomplete guideline application information. Of the 667,844 remaining cases, 591,882 were excluded that were not sentenced under § 2B1.1. Of the remaining 75,962 cases sentenced under § 2B1.1, 1,112 were excluded that were sentenced using a Guidelines Manual in effect prior to November 1, 2001. Calculation of the mean includes sentences of probation as zero months and any term of confinement as described in USSC § 5C1.1. Sentences of 470 months or longer (including life) are included in the calculation as 470 months. An additional 75 cases were excluded due to missing information on sentence length.



3. Amount of Loss Increased

As the minimum guideline range and ultimate length of sentence increased, so too did the amount of loss. Indeed, this is no surprise because the dollar amount of the loss is a major determinant of the guideline range. The median loss amount increased steadily over the decade from \$18,414 in fiscal year 2003 to \$95,408 in fiscal year 2012, a 418.12 % increase.¹²⁷

4. Average Guideline Minimum Exceeds Sentence Length, Especially for Huge Offenders

In the 2012 Guidelines Manual, §2B1.1(b)(1), the fraud guideline monetary table contains 16 SOC's based on the amount of the loss expressed in ranges.¹²⁸ For example, the lowest range is

¹²⁷ *Id.* at 2. Of the 769,466 cases, 101,622 were excluded due to incomplete guideline application information. *Id.* Of the 667,844 remaining cases, 591,882 were excluded that were not sentenced under § 2B1.1. *Id.* Of the remaining 75,962 cases sentenced under § 2B1.1, 1,112 were excluded that were sentenced using a Guidelines Manual in effect prior to November 1, 2001. *Id.* An additional 11,356 cases were excluded due to missing information on exact loss amount. *Id.* The median is the midpoint so that half of the loss amounts are greater than the median and the remaining half are less than the median.

¹²⁸ U.S. SENTENCING COMM'N, *supra* note 111 § 2B1.1(b)(1)(A)-(P). This section of 2B1.1(b)(1)(A)-(P) is set forth here:

(b) Specific Offense Characteristics

(1) If the loss exceeded \$5,000, increase the offense level as follows:

Loss (Apply the Greatest)

Increase in Level

(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add 2
(C)	More than \$10,000	add 4
(D)	More than \$30,000	add 6
(E)	More than \$70,000	add 8
(F)	More than \$120,000	add 10

\$5,000 or less, the next range is more than \$5,000, the next more than \$10,000 all the way up to the highest: more than \$400,000,000.¹²⁹ Each increase in the SOC beyond the lowest one adds a 2 point incremental upward increase in the offense level, before other adjustments are made, thus increasing the length of the guideline sentence based on the loss amount.¹³⁰

Figures 3 and 3A below represent the average guideline and sentence imposed for fraud offenders in FY 2012 for each of the loss table categories then in existence before the 2015 Guidelines Manual adjusted the loss levels for inflation. These figures also show the number of offenders in each loss category. For example, at the lowest loss category for FY 2012, \$5,000 or less, there were 1,247 offenders sentenced. This was the highest number of offenders sentenced in any loss category. At the highest end of the loss categories, \$400,000,000, there were just nine offenders sentenced. Somewhere close to the middle of the loss categories (more than one million but less than 2.5 million), there were 727 offenders. The vast majority of fraud offenders, 83.0%, in FY 2012, were from the lower half of the loss tables, involving \$1,000,000 or less.

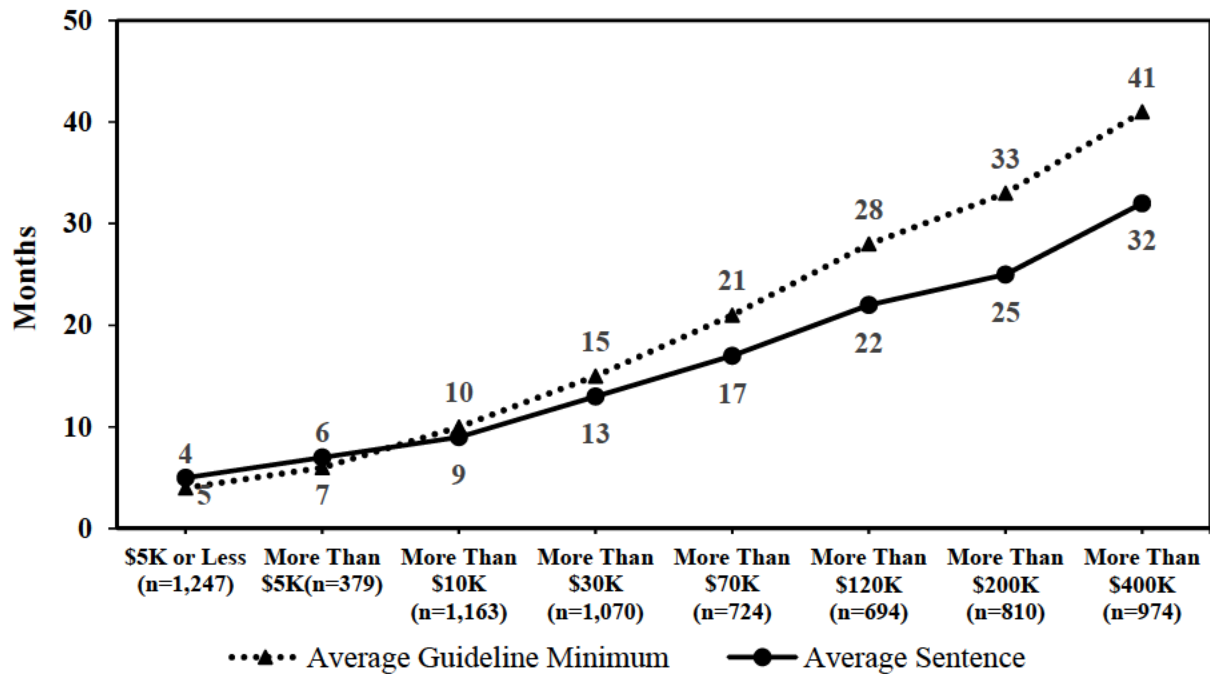
(G)	More than \$200,000	add 12
(H)	More than \$400,000	add 14
(I)	More than \$1,000,000	add 16
(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30 .

This guideline, and other monetary tables within the guidelines, was amended effective Nov. 1, 2015 “to account for inflation.” Transmittal letter accompanying the 2015 Guidelines Manual from the Chair of the Sentencing Commission, Judge Patti B. Saris, Sept. 15, 2015 (on file with the authors).

¹²⁹ *Id.*

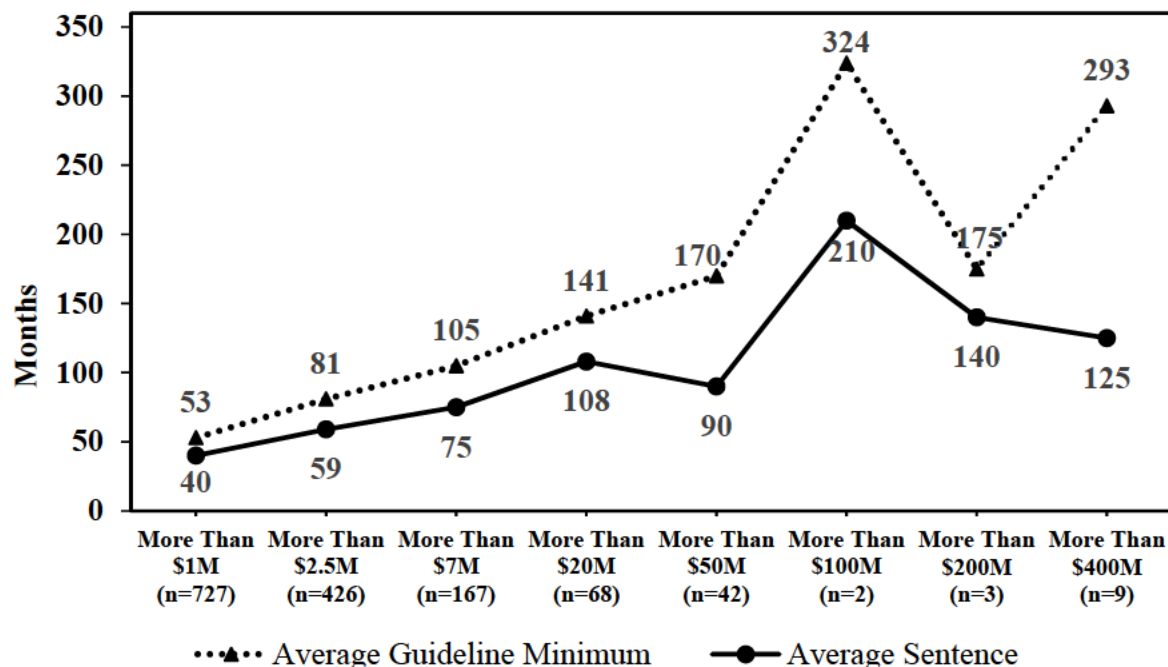
¹³⁰ *Id.*

FIGURE 3.¹³¹
 AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM
 FOR EACH § 2B1.1 LOSS TABLE CATEGORY
 (FISCAL YEAR 2012)



¹³¹ See U.S. SENTENCING COMMISSION, *supra* note 121, at 7. Of the 84,173 cases in the fiscal year 2012 datafile, 9,678 were excluded due to incomplete guideline application information. *Id.* Of the 74,495 remaining cases, 65,985 were excluded that were not sentenced under § 2B1.1. *Id.* Of the remaining 8,510 cases sentenced under § 2B1.1, three were excluded that were sentenced using a Guidelines Manual in effect prior to November 1, 2011 or for other logical criteria. *Id.* An additional two cases were excluded due to missing information on sentence imposed. *Id.*

FIGURE 3A.
AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM
FOR EACH § 2B1.1 LOSS TABLE CATEGORY
(FISCAL YEAR 2012)



From this 2012 fraud sentencing data, it is clear that, as the loss increases, so does the gap between the average guideline minimum (which increases rapidly) and the average sentence (which increases less rapidly).¹³² The percent of sentences within the guideline range for offenders in the lowest loss category (\$5,000 or less) was 84.1%.¹³³ Between \$7-20 million, it dropped to 26.8%, and dropped to 0.0% for the nine offenders in the more than \$400,000,000 loss category.¹³⁴

5. Summary

While massive white-collar fraud schemes grab the news headlines, the data establish that most white-collar fraud offenders in federal court remain nameless and faceless, and their cases involve loss amounts far tinier than the front-page news grabbers. The median loss in all federal cases under guideline §2B1.1 in FY 2014 was only \$118,081.¹³⁵ The data also show, however, that these “run-of-the-mill” economic criminals, like their high-value criminal counterparts (although to a lesser extent than these high-value counterparts), regularly receive sentences below the recommended sentencing guidelines. The statistical evidence on sentencing discretion, then, raises the question of whether, after three decades of sentencing reform, judges still empathize with economic criminals as they were reported to do in the 1980s, or if the sentencing guidelines

¹³² *Id.* at 8.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See U.S. SENTENCING COMM’N, *supra* note 112.

simply fail to approximate judges' proper estimates of the harm done.

III. THE EMPIRICAL STUDY

A. *Introduction*

In an effort to explore how federal judges make white-collar sentencing decisions in a modern context, we designed a study to measure judges' sentences and sentencing philosophies in the context of a medium-to-high value (approximately \$7 million) economic crime. We deployed the study among a group of 240 federal district court judges, federal magistrate judges, and state trial judges. Federal judges from all twelve circuits (including the DC Circuit) participated in the study, as did state court judges from eight different states. We conducted the study using three cohorts of judges, not only to get a broad judicial sample, but also to be able to compare the responses of the different types of judges. For example, if federal district court judges' sentences are more lenient than magistrate or state court judges for the exact same crime, it could potentially be due to these judges' familiarity with, and wariness of, the Federal Sentencing Guidelines. In addition to measuring sentencing discretion (as well as retribution-based and mercy-based sentencing philosophies) across all three types of judges, we were also interested in measuring whether judges harbored stereotypes related to a defendant that would affect their judgment.¹³⁶ Furthermore, we were interested in investigating the relationship, if any, between the judges' sentences and their sentencing philosophies, age, judicial experience, gender, or religion, or the political affiliation of the relevant appointing United States President.

B. *Participants*

240 judges participated in the study, all of whom participated voluntarily on their own time and on their own computers. 181 federal judges participated in the study, 100 of whom were district court judges, and 81 of whom were magistrate judges. 57 state judges from eight states participated in the study. 71% of the judges were male and 29% were female. The vast majority of judges (91.6%) identified themselves as White. 3% identified themselves as African American. 2% identified themselves as Asian, and 2% identified themselves as "more than one race."¹³⁷ The age of judge participants was collected in decades (in order to preserve anonymity) and ranged from 21-30 to 80-plus, with the majority of judges (71%) between the ages of 51 and 70.¹³⁸ In terms of religion, 31% identified themselves as Protestant, 30% identified as Catholic, 21% identified as "none", and 11% identified as Jewish. The remaining judges identified religious affiliations including Baptist and Latter Day Saints, as well as others.

¹³⁶ The group-membership and stereotype-related bias portion of this empirical study is presented and considered in depth in Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judicial Implicit Biases of Asians and Jews: A National Study of Federal and State Judges* (2016, unpublished manuscript, on file with authors).

¹³⁷ We separately asked if judges identified as Hispanic or Latino. 5% of judges indicated that they identified as Hispanic or Latino.

¹³⁸ 37% reported being between the ages of 51-60 and 34% between the ages of 61-70.

C. Materials

After giving informed consent and completing demographic information, participants began the online study by completing the sentencing task first.

The sentencing task asked judges to read a realistic federal-style presentence report for a garden variety securities fraud case. The presentence report, which is attached as Appendix B, described a fraud crime in which the alleged perpetrator had agreed to plead guilty for federal securities fraud in violation of 18 U.S.C. § 1348. Judges read that “the defendant abused his position of trust within the company by persuading [a company for which he was the director] to give him money and stock under the guise that he was going to take the company private through a stock buyback.” The amount involved in the fraud was estimated to be between \$6,800,000 and \$7,200,000 because certain records had been lost. This created an overlapping loss amount under the guidelines then in existence. The defendant, like most white-collar offenders, had no prior criminal record. Under the Federal Sentencing Guidelines, a conviction for such a crime results in a guideline sentencing range between 151-240 months in prison. However, to simplify the presentence report and make it understandable to federal magistrate judges who do not sentence federal felony offenders and state trial court judges who do—but would lack sufficient familiarity with the federal sentencing guidelines—we eliminated the guideline calculations and went with a stipulated guideline range of 151-240 months and a 11(c)(1)(C) plea agreement that required the judges to sentence the defendant within this range.¹³⁹

Because we were interested in whether the defendant’s group affiliation would affect judicial response as reflected in sentencing, judges were given a case that described either a Caucasian defendant, an Asian defendant, a Christian defendant, or a Jewish defendant.¹⁴⁰ The religion of the defendant was identified by stating that the defendant and his wife were active in either the Christian or Jewish community, and that the defendant’s brother served as a member of the clergy of either a Christian church or Jewish synagogue. All other information about the defendant was identical, including age (47), marital status (married), citizenship (US), birth place (Chicago, IL), and education (Masters’ degree).

After the judges completed the securities fraud sentencing task, they were asked questions relating to their personal sentencing philosophy. This scale included four questions designed to measure support for retributive punishment (“A person who commits the harshest crime deserves the harshest punishment” and “Those who hurt others deserve to be hurt in return”) as compared to mercy or rehabilitation (“People who commit serious crimes often should receive treatment instead of punishment” and “People who commit serious crimes sometimes deserve leniency”). They then completed an Implicit Association Test¹⁴¹ and reported levels of agreement or disagreement with group-related attitudes and stereotypes.¹⁴²

¹³⁹ See Appendix A.

¹⁴⁰ The defendant’s group membership was varied by using different defendant names. The Caucasian and Christian defendants were named Nathaniel Kinnear. The Asian defendant was named Michael Zhang. The Jewish defendant was identified as Nathaniel Goldberg.

¹⁴¹ Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998).

¹⁴² Specifically, the judges were asked to report their attitudes and stereotypes toward Asians and Jews. For a detailed look at these questions and the different responses of judges, see Levinson, Bennett & Hioki, *supra* note 136.

D. Results

The following subsections highlight our major findings.

1. Judges Regularly Sentenced at the Exact Bottom of the Range

The majority of judges sentenced the defendant at the precise bottom of the stipulated guideline range of 151 months. 135 judges of 239 sentenced the defendant at the exact 151-month bottom of the guideline range. (The study did not allow below-range sentencing.) This comprises 56.7% of the judges surveyed.

When broken down by judicial cohorts, the data revealed significant differences between them on the length of sentencing. Federal district court judges gave the shortest sentences. Seventy-five of one hundred, or 75% of the federal district judges, sentenced at the 151-month bottom of the guideline range. Forty-four of eighty, or 55% of the magistrate judges, sentenced at the 151-month bottom of the guideline range. Sixteen of fifty-nine, or 27.1% of state trial judges, sentenced at the 151-month bottom of the guideline range. The mean sentences for the judicial cohorts also reflected this finding. For all federal district judges, the mean sentence was 158.08 (SD = 13.85) months. The mean sentence for all magistrate judges was 164.51 (SD = 19.17) months. The mean sentence for all state trial judges was 174.81 (SD = 22.51) months. This difference in mean sentencing for each judicial cohort was statistically significant,¹⁴³ such that state judges sentenced longer than magistrate judges, who in turn sentenced longer than district court judges.

FIGURE 4.
PERCENTAGE OF JUDGES SENTENCING AT THE
151-MONTH BOTTOM OF THE GUIDELINE RANGE.

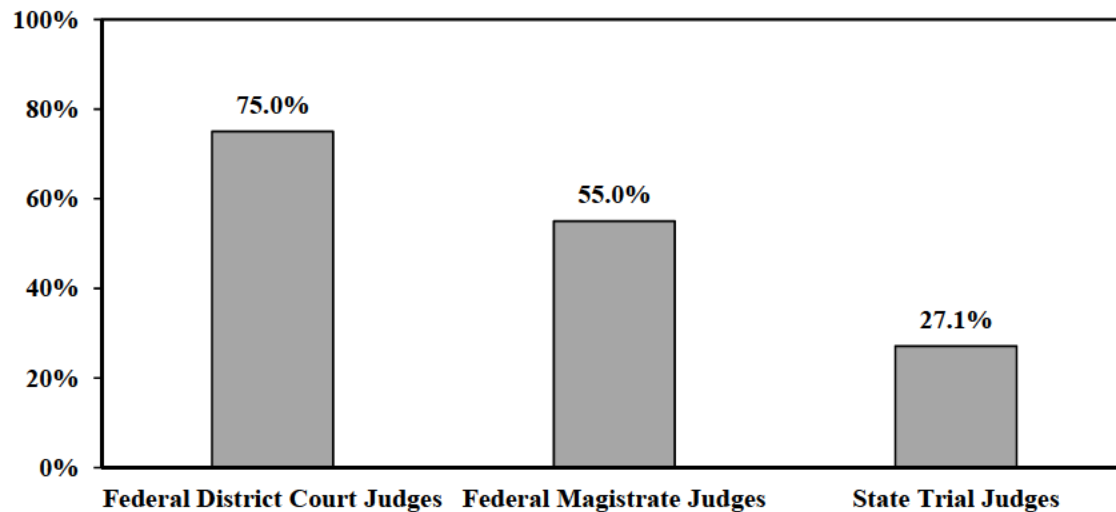
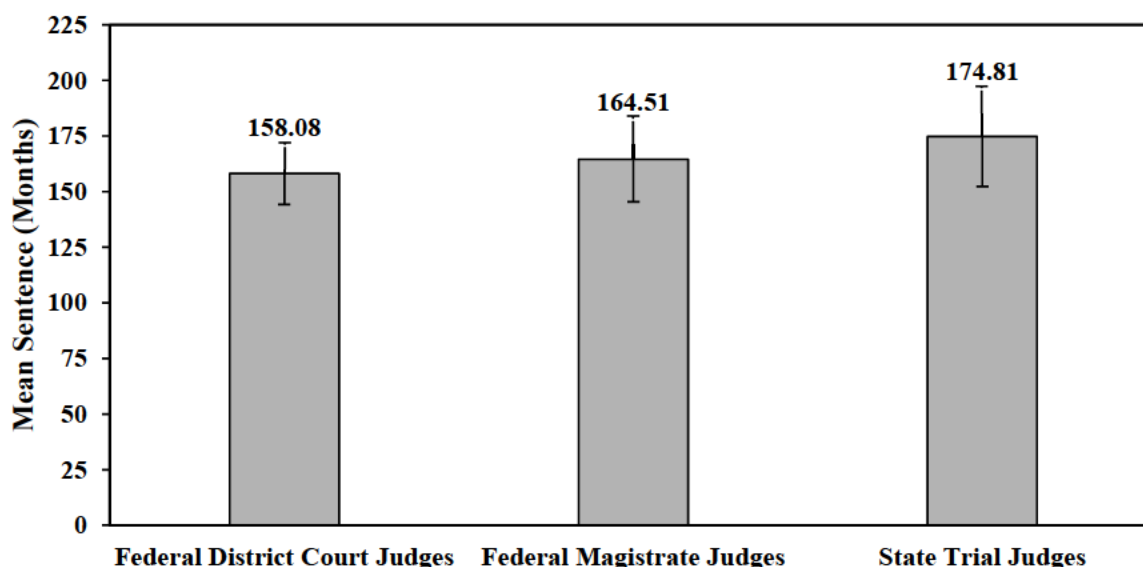


FIGURE 4A.
MEAN SENTENCE IN MONTHS (+/- 1 SD).

¹⁴³ $F(2, 236) = 15.84, p \leq .01$.



2. *Older Federal Judges Gave Shorter Sentences*

While there was no correlation between years of judicial experience and the length of the sentence, there was a correlation between the age of the judge and the length of the sentence. For each of the two federal judicial cohorts, we found that the older the judge, the shorter the sentence.¹⁴⁴ However, there was no such correlation for state trial judges.¹⁴⁵ Relatedly, the age of the judges was also related to support for mercy. Across the sample of judges, the older the judges were at the time of the study, the more likely they were to self-report more agreement with mercy-related sentencing philosophies.¹⁴⁶

3. *Federal District Court Judges (Marginal Significance) Gave Longer Sentences to Jewish (vs. Christian) Defendants; State Court Judges Gave Longer Sentences to Caucasian (vs. Asian) Defendants*

Although there is reason to believe that judges would perhaps be influenced by the defendant's group membership in sentencing,¹⁴⁷ the results indicated that, for the combined group of 240 federal and state judges, the judges' desire to sentence the defendant at or near the minimum sentence occurred regardless of the defendant's group membership. An ANOVA revealed that there were no significant group-membership effects on sentencing. However, when looking at the three cohorts of judges separately, some interesting results emerge.

Federal district judges gave (of marginal significance) longer sentences to Jewish defendants than Christian defendants.¹⁴⁸ There were no significant differences in how these judges

¹⁴⁴ $r(\text{federal trial}) = -0.22, p < .05, r(\text{federal magistrate}) = -0.25, p < .05$.

¹⁴⁵ $r = -0.07, ns$.

¹⁴⁶ $r = 0.14, p < .05$.

¹⁴⁷ For a detailed discussion of the role of Asian and Jewish defendants, and finding moderate to strong negative morality-related implicit biases against Asians and Jews among the judges we surveyed here, see Levinson, Bennett & Koichi, *supra* note 136.

¹⁴⁸ $F(1, 52) = 2.89, p = .095, \eta_p^2 = .05, M_{\text{Jewish}} = 160.12, SD = 15.51, M_{\text{Christian}} = 153.90, SD = 6.51$.

sentenced Caucasian as compared to Asian defendants. Magistrate judges did not give significantly longer sentences to any of the groups. State judges, counterintuitively, sentenced Caucasian defendants to significantly longer sentences than Asian defendants.¹⁴⁹

4. *State Judges Self-Reported More Retributive Sentencing Philosophies*

When asked to state how much they agree with the retributive concepts, “the harshest crime deserves the harshest punishment,” and “those who hurt others deserve to be hurt in return,” state judges reported (of marginal significance) more retributive sentencing philosophy (on a combined retribution measure), as compared to federal district judges.¹⁵⁰

5. *Republican Judicial Appointees More Supportive of Retribution, but Nonetheless Sentence Similarly*

Based upon the year of appointment information provided by federal district judges, we were able to determine the party of the appointing President of the United States. We then compared Republican-appointed judges with Democrat-appointed judges with regard to punishment philosophy. Data showed that Republican appointees were significantly more likely to agree with the retribution theory question, “A person who commits the harshest crime deserves the harshest punishment,”¹⁵¹ but not the question focused on a defendant’s need to be “hurt in return.”¹⁵²

6. *Democratic Judicial Appointees More Supportive of Mercy*

With regard to mercy philosophy, Democratic appointees were significantly more likely than Republican appointees to agree with the mercy theory questions, “People who commit serious crimes sometimes deserve leniency,” and “People who commit serious crimes often should receive treatment instead of punishment.”¹⁵³ Interestingly, however, judges appointed by Democratic Presidents and Republican Presidents sentenced the defendant almost identically.¹⁵⁴

7. *Protestant State Court Judges Report More Retributive Sentencing Philosophy, but Did Not Sentence Differently*

Because the judges were invited to respond to demographic questions, including which religion they self-identified with, we were able to compare responses of judges who affiliated with

¹⁴⁹ $F(1, 26) = 6.77, p = .05, \eta_p^2 = .21, M_{\text{Caucasian}} = 184.00, SD = 24.06, M_{\text{Asian}} = 163.50, SD = 14.73.$

¹⁵⁰ $F(2, 236) = 2.42, p = .09, \eta_p^2 = .02, M_{\text{ST}} = 4.46 (SD = 1.02), M_{\text{FT}} = 4.01 (SD = 1.42), M_{\text{FM}} = 4.10 (SD = 1.23).$

¹⁵¹ $F(1, 98) = 5.23, p < .10 (= .07), \eta_p^2 = .03, M_{\text{Republican}} = 5.23 (SD = 1.87), M_{\text{Democratic}} = 4.61 (SD = 1.52).$

¹⁵² $F(1, 98) = 0.59, ns., M_{\text{Republican}} = 3.28 (SD = 1.65), M_{\text{Democratic}} = 3.10 (SD = 1.68).$

¹⁵³ $F(1, 98) = 4.14, p < .05, \eta_p^2 = .04, M_{\text{Republican}} = 4.00 (SD = 1.43), M_{\text{Democrat}} = 4.57 (SD = 1.31).$

¹⁵⁴ $M_{\text{Republican}} = 158.46 (SD = 14.85)$ months, republican appointees; $M_{\text{Democratic}} = 157.84 (SD = 13.30)$ months, democratic appointees.

some religions or with no religions. The largest groups of affiliation were “no religion” (n= 50), Protestant (n= 77), and Catholic (n= 71).¹⁵⁵ Due to the small numbers other than “no religion,” Protestant, and Catholic, we compared these three groups. Comparisons showed that judges who identified as Protestant were significantly more likely to agree with the retribution-focused punishment theory questions than judges who self-identified as Catholic or “no religion.”¹⁵⁶ Despite the differences in retribution sentencing philosophy, the judges from these three groups did not sentence the defendant differently.¹⁵⁷

8. *Judges’ Mercy Philosophies, but Not Retribution Philosophies, Predicted Sentence Length*

The more the judges agreed with mercy punishment philosophies (“People who commit serious crimes often should receive treatment instead of punishment,” and “People who commit serious crimes sometimes deserve leniency”), the shorter they sentenced the defendant. Unlike these mercy questions, retribution sentencing theory questions were not significantly correlated with judges’ sentences. A regression analysis¹⁵⁸ confirmed that support for mercy theories, but not retribution theories, predicted the judges’ punishment by marginal significance¹⁵⁹ for the combined groups of judges.

Further analysis showed the relationship between mercy and sentence length was stronger for federal judges than state judges. For federal judges, the regression model was significant,¹⁶⁰ indicating that federal judges’ mercy philosophies predicted their sentences. This finding was not significant for state judges.¹⁶¹

E. *Discussion*

Although we believe many of these individual findings to be worthy of further examination and discussion in the context of economic crime sentencing overall, the most compelling finding in the context of judicial discretion and the evolution of white-collar criminal sentencing was that nearly three out of four federal district judges imposed the precise minimum sentence, despite a wide possible sentencing range of seven years. Furthermore, we found that this finding was predicted by judges’ self-reported agreement with mercy-related punishment rationales (but not retributive punishment rationales), as well as correlated with the age of the judge, and we also found that other judges—magistrates as well as state court—did not show this same level of leniency.¹⁶² As we have discussed, researchers have argued that judges have identified with white-

¹⁵⁵ Other religions represented included Jewish (n=25), American Methodist Episcopal (n<5), Latter-Day Saints (n<5), and Baptist (n<5).

¹⁵⁶ $F(2, 195) = 11.01, p < .01, \eta_p^2 = .10, M_{\text{Protestant}} = 4.63$ (SD = 1.08), $M_{\text{Catholic}} = 4.06$ (SD = 1.32), $M_{\text{No religion}} = 3.59$ (SD = 1.34)).

¹⁵⁷ For federal district judges, $M^{\text{Protestant}} = 158.92, M^{\text{Catholic}} = 158.93$, and $M^{\text{No religion}} = 157.95$.

¹⁵⁸ Sentenced Month = Beta1 x Mercy + Beta2 x Retribution + Constant.

¹⁵⁹ Adjusted R Square = .02, $F(2, 236) = 3.04, p = .05$. Beta1 = -.16, $t = 2.45, p < .05$; Beta2 = -.02, $t = .27, ns$.

¹⁶⁰ Adjusted R Square = .03, $F(2, 177) = 3.50, p = .05$. Beta1 = -.16, $t = 2.14, p < .05$; Beta2 = -.11, $t = 1.4, ns$.

¹⁶¹ Adjusted R Square = -.02, $F(2, 56) = .52, ns$.

¹⁶² There are multiple reasons for the possible gap between state court judges, magistrate judges and federal district court judges. One possibility is simply that elected judges (as most or all of our state

collar criminals more than other criminals, and that this possible empathic connection has led to sentencing leniency.¹⁶³ Such an argument would be consistent with our finding that mercy philosophy, but not retribution philosophy, predicted punishment.

As judicial discretion has been restored by *Booker* and *Gall*, judges once again have the ability to adjust sentences outside of the guideline range. Our study shows that, in the context of a harsh sentencing regime for mid-to-high value economic crimes, judges across America's federal court system may still be holding back in sentencing economic criminals. Yet, we found that this holding back was significantly more pronounced for federal district judges as compared to magistrate and state court judges, suggesting that the results of the study are likely not entirely empathy-based.

Although federal district judges' resistance to a recommended sentence might have been legitimate cause for concern in the era of light economic crime sentencing (at least to the extent that one regards empathy as an undesirable trait in sentencing), the cause of the judges' resistance in the study may be understood when considered in historical context. As we have described, there is much to be desired in the federal economic crime sentencing scheme, and the continued overlooking of a variety of formula misjudgments by the Sentencing Commission cannot possibly go unnoticed by federal district judges. Thus, it is plausible that federal district judges' "short" sentences were not entirely due to empathy, but rather experience with (or rejection of) overly harsh sentencing guidelines.

Perhaps adding to the timeliness of the study results was that, at the very time judges were participating in this study, the Commission's most recent series of proposed Amendments were well on their way to becoming law, although not without significant criticism. In the next section, we summarize the 2015 Amendments to the Fraud Guideline, which were heavily criticized by a range of commentators, yet remained untouched by Congress and officially became part of the Guidelines on November 1, 2015, and consider the continuing failures of the new Guidelines to address long-known shortcomings of the scheme, especially as they relate to the exceedingly harsh punishments of high value economic criminals.

IV. THE 2015 AMENDMENTS TO THE FRAUD GUIDELINE § 2B1.1 AND THE CRITICAL RESPONSE

A. *Introduction*

Since the fraud and theft guidelines were consolidated in 2001, these guidelines have "been a subject of sustained comment and critique...."¹⁶⁴ The primary drumbeat of complaints has centered on the criticism that white-collar fraud defendants, especially those who were first time offenders, and those with higher dollar loss amounts, were eligible for extremely Draconian-length guideline sentences.¹⁶⁵ Thus, on January 9, 2015 the Commission proposed a preliminary series

judge participants were) may feel a greater need to display punitiveness, or at least a lesser need to make a downward departure from a sentencing guideline range. It is notable in this context that state court judges' mercy philosophies did not predict their sentences.

¹⁶³ Mann et al., *supra* note 19.

¹⁶⁴ Bowman, *supra*, note 81 at 271. *See also*, Berman, *supra* note 94, at 267 ("The federal fraud guidelines have long had many critics among judges and commentators.").

¹⁶⁵ *See, e.g.*, Felman, *supra* note 77; Ellis et al., *supra* note 78; Bowman, *supra* note 81 at 272 (Both the ABA and defense advocacy groups argue that § 2B1.1 is fatally flawed, results in virtually all

of amendments to the economic crime guideline, §2B1.1., that upon publication in the Federal Register triggered the 60-day notice and public comment period.¹⁶⁶ The Commission had spent several years studying and reexamining the economic crime guideline.¹⁶⁷ Commission Chair, Chief Judge Patti B. Saris, in her remarks accompanying the release of the proposed preliminary revisions to the fraud guideline noted that the Commission had held a symposium on the subject in 2013 at the John Jay College of Criminal Justice, the Commission staff had “spent countless hours analyzing data on fraud cases...,” and had met with judges and the ABA.”¹⁶⁸ Chief Judge Saris concluded that, “[T]his extensive process has led us to believe that the fraud guideline may not be fundamentally broken for most forms of fraud.”¹⁶⁹ As Professor Bowman commented, “[T]his carefully modulated conclusion did not go down well among those who, like the ABA and some defense advocacy groups, feel that the guideline is fundamentally flawed,” and results in too extreme of sentences across the board and needs to be completely redrafted.¹⁷⁰

Indeed, the Commission’s proposed amendments to the fraud guideline, discussed below, were met with disappointment and alternative proposals by several of the stakeholders, also discussed below, to remedy the long-standing problems of the fraud guideline not addressed by the Commission’s proposed amendments.

B. *The 2015 Proposed Changes to the Fraud Guideline*

In brief,¹⁷¹ the Commission’s January 16, 2015 proposed amendments to the fraud guideline (§2B1.1) contained components that were presumably designed to address some of the shared criticisms of the fraud guideline. As we will describe, these amendments invited comment,

guideline ranges being too harsh, and needs to be completely redrafted.); *United States v. Parris*, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) (Fredric Bock, J.) (“[W]e now have an advisory guideline regime where...any officer or director of virtually any public corporation who has committed securities fraud will be confronted with a guideline calculation either calling for or approaching lifetime imprisonment.”); *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006) (Jed S. Rakoff, J.) (Commenting in this financial fraud crime where Adelson’s guideline range called for a life sentence “the utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.”); *United States v. Watts*, 707 F.Supp.2d 149 (D. Mass. 2010) (Nancy Gertner, J.) (Noting that the guidelines called for a life sentence with a total offense level of 43 and a criminal history of 1, but was trumped by a statutory maximum of a 5 year sentence – demonstrating the ridiculous nature of the guidelines in this case).

¹⁶⁶ U.S. SENTENCING COMM’N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (Jan. 16, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150109_PRELIM_RF_amendments.pdf

¹⁶⁷ See Bowman, *supra*, note 81 at 271; REMARKS OF COMMISSION CHAIR CHIEF JUDGE PATTI B. SARIS (Jan. 9, 2015), *available at* <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150109/Remarks.pdf> [hereinafter REMARKS OF CHIEF JUDGE SARIS].

¹⁶⁸ REMARKS OF CHIEF JUDGE SARIS, *supra* note 167, at 2.

¹⁶⁹ *Id.*

¹⁷⁰ Bowman, *supra*, note 81 at 271.

¹⁷¹ For a comprehensive discussion of the Commission’s proposed Jan. 16, 2015 amendments to the fraud guideline *see* FRANK O. BOWMAN III, COMMENT ON PROPOSED AMENDMENTS TO ECONOMIC CRIME GUIDELINE, § 2B1.1 (Feb. 19, 2015), *available at* <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Bowman.pdf>

but were ultimately passed on to Congress with only a few minor changes. The document proposed, and eventually incorporated, the following into the Guidelines:

- A revision of “the victim table in § 2B1.1(b)(2) to specifically incorporate substantial financial hardship to victims as a factor in sentencing economic crime offenders.”¹⁷²
- A Commission-proposed amendment to the definition of “intended loss” in Application Note 3(A)(ii) of §2B1.1 to reflect the position of the Tenth Circuit that it is an objective inquiry due to a circuit split over whether the definition of “intended loss” comprised a subjective or objective inquiry.¹⁷³
- An altered the definition of the “sophisticated means” special offense characteristic at §2B1.1(b)(10)(C) to “narrow the focus” to “cases in which the defendant intentionally engaged in or caused conduct constituting sophisticated means” from the broader approach of applying “sophisticated means” if “the offense otherwise involved sophisticated means.”¹⁷⁴
- A revision of “the special rule at Application Note 3(F)(ix) relating to the calculation of loss in cases involving fraudulent inflation or deflation in the value of a publicly traded security or commodity.” (Fraud on the market).¹⁷⁵
- An amendment to add an inflationary adjustment to the monetary tables contained in the guidelines, including the fraud loss tables in § 2B.1.1(b)(1).¹⁷⁶

C. *The Public Comment Period and Public Hearing*

¹⁷² U.S. SENTENCING COMMISSION, AMENDMENTS TO THE SENTENCING GUIDELINES (Apr. 30, 2015), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150430_RF_Amendments.pdf [hereinafter 2015 GUIDELINE AMENDMENTS]. For the original Proposed Amendments, see U.S. SENTENCING COMM’N, *supra* note 166, at 72.

In amending the victim table, the Commission’s commentary accompanying the proposed amendment noted that they believed “the number of victims is a meaningful measure of harm and scope of an offense and can be indicative of its seriousness;” and that consistent with the “Commission’s overall goal of focusing more on victim harm” the amended victim table ensures an offense with just “one victim suffering substantial financial harm” receives greater punishment while simultaneously “lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.” The proposed amendment also adds a list of non-exhaustive factors for courts to assist in deciding “whether the offense caused substantial financial hardship.”

¹⁷³ 2015 GUIDELINE AMENDMENTS, *supra* note 172 at 24-25. The modification to the definition of “intended loss” balances the Commission’s assertion that intended loss “is an important factor in economic crime offenses” but that increased sentences based on intended rather than actual loss “should focus more specifically on the defendant’s culpability.”

¹⁷⁴ *Id.* at 25. Narrowing the focus of “sophisticated means” from applying it if “the offense otherwise involved sophisticated means” to examine “the defendant’s own intentional conduct better reflects the defendant’s own culpability” and minimizes “application of this enhancement to less culpable offenders.”

¹⁷⁵ *Id.* The amended special rule for “fraud on the market” cases “reflects the Commission’s view that the most appropriate method to determine a reasonable estimate of loss will often vary in these highly complex and fact-intensive cases.”

¹⁷⁶ *Id.* at 12-14. The inflationary adjustment amendment to the monetary tables contained in the guidelines, including the fraud loss tables in § 2B.1.1(b)(1), adjusts the amounts in each seven monetary tables in the guidelines to reflect inflation.

During the 60-day public comment period for the 2015 fraud and other amendments to the guidelines, the Commission received written comments from numerous groups and individuals including, *inter alia*: the United States Department of Justice; Federal Public and Community Offenders; Advisory groups for Practitioners, Probation Officers and Victims; the ABA; Families Against Mandatory Minimums; the National Association of Criminal Defense Lawyers; Washington Legal Foundation; Professor Frank O. Bowman III; various citizens; and even a third year law student, Alexandra L Nelson.¹⁷⁷

Many of the comments sent to the Commission reflect views similar to the Federal Defender community. While the Federal Defender community was pleased to work with the Commission on the fraud guideline over the past several years, they were disappointed that at the end of the process, the Commission believed “the fraud guideline may not be fundamentally broken for most forms of fraud. Our experience and interpretation of the data are to the contrary.”¹⁷⁸ After detailing their concerns, the Federal Defender community concluded that the Commission’s proposed amendments to the fraud guideline fail to address the core problems that cause the fraud guideline sentencing ranges to be higher than necessary in so many cases.¹⁷⁹ The Federal Defender community asserted that any amendments to the fraud guideline need to:

- Reduce the overemphasis on loss as the primary driver of culpability
- Eliminate intended loss
- Allow loss to be mitigated by various factors related to culpability
- Eliminate entirely the victim table
- Eliminate entirely the enhancement for sophisticated means
- Cap the cumulative effect of SOC’s
- Eliminate the floor for non-violent offenses
- Possibly include a safety valve
- Encourage alternatives to incarceration¹⁸⁰

D. The Fraud Guideline Amendment Sent to Congress on April 30, 2015

¹⁷⁷ *Letters Received by the United States Sentencing Commission in Response to Request for Public Comment on Proposed Amendments*, U.S. SENTENCING COMM’N (Mar. 2015), <http://www.ussc.gov/amendment-process/public-comment/public-comment-march-18-2015>.

Ms. Nelson, at the time a third year law student at the University of Utah, S.J. Quinney College of Law, submitted thoughtful written comments asking the Commission to expand its definition of victim harm to include non-economic harm noting that the victims of Bernard Madoff’s scheme suffered “emotional, spiritual and psychological devastation that was ‘indescribable.’” Letter from Alexandra L. Nelson, to U.S. Sentencing Comm’n 3 (Mar. 17, 2015), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/Nelson.pdf>.

¹⁷⁸ Michael Caruso, *Statement Before the United States Sentencing Commission Public Hearing on Economic Crime and Inflationary Adjustments* 1 (Testimony, U.S. Sentencing Comm’n, Washington D.C., March 12, 2015), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/FPD.pdf> (internal quotation marks and footnote omitted).

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.*

The Amendment was untouched by Congress and became part of the fraud guideline on November 1, 2015.¹⁸¹ There were some differences between the proposed fraud amendments announced by the Commission on January 16, 2015, and the April 30, 2015, amendments forwarded to Congress that became law on November 1, 2015.¹⁸² The major proposed fraud amendment worth noting is the Commission's proposal to reduce the size of the victim number enhancement in § 2B1.1(b)(2) from 2, 4, and 6 levels to 1, 2, and 3 levels.¹⁸³ In the final April 30, 2015 amendments, the Commission combined its attempt to reduce the effect of mere victim numbers with its proposed "substantial hardship" amendment to create a "curious hybrid" that Professor Bowman predicts will, at best, have a "very modest net ameliorative effect" but only "in the universe of high-loss cases."¹⁸⁴

E. ABA and Commentator Responses to the New Fraud Guideline

James E. Felman, a prominent federal criminal defense lawyer from Tampa, Florida, testified on behalf of the ABA at the public hearing before the Commission on March 12, 2015.¹⁸⁵ Felman testified that the fraud guideline "appears to be broken" and that the Commission's proposed amendments "simply do not go far enough to reduce the unwarranted emphasis on both loss and multiple specific offense characteristics that, alone and especially in combination, tend to overstate the seriousness of many offenses."¹⁸⁶ Felman testified that the Commission needed to go further than the proposed amendments by amending the fraud guideline to (1) "place greater emphasize on the mens rea and motives in relation to the offense," (2) focus on "whether and to what extent the defendant received a monetary gain from the offense," (3) consider "other circumstances that better reflect the culpability of the offender and the severity of the offense," and (4) "reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."¹⁸⁷

¹⁸¹ For a comprehensive discussion of the Commission's amendments to the fraud guideline forwarded to Congress, see Bowman, *supra* note 81.

¹⁸² See generally Bowman, *supra* note 81, at 276-277.

¹⁸³ See U.S. SENTENCING COMM'N, *supra* note 166, at 72.

¹⁸⁴ Bowman, *supra* note 81, at 277.

¹⁸⁵ James E. Felman, *Testimony on Behalf of the American Bar Association Before the United States Sentencing Commission for Hearing on Proposed Amendments to the Federal Sentencing Guidelines Regarding Economic Crimes*, (Testimony, U.S. Sentencing Comm'n, Washington D.C., March 12, 2015) available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Felman.pdf>.

Mr. Felman is a former Co-Chair of the Commission's Practitioner's Advisory Group and Chair of the Criminal Justice Section of the ABA and their liaison to the Commission. *Id.*, at 1. Felman indicated that the ABA's position on the fraud guideline reflected "the collaborative efforts of representatives of every aspect of the profession, including prosecutors, defense attorneys, judges, professors, and victim advocates, as well as a special task force of expert academics, judges, and practitioners assembled specifically to address this topic."

¹⁸⁶ *Id.* at 2.

¹⁸⁷ 28 U.S.C. § 994(j); Felman, *supra* note 185, at 2.

In urging the Commission to reduce its overwhelming emphasis on loss as the primary driver of lengthy fraud sentences, Mr. Felman, in his testimony, emphasized this point by citing to a more than decade-old passage from a Judge Gerald Lynch opinion¹⁸⁸:

The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting—no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes—to assign precise weights to the theft of different dollar amounts. In many cases ... the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.¹⁸⁹

Because of the plethora of flaws the ABA perceived in the existing fraud guideline and the lack of meaningful solutions in the Commission’s proposed amendments, the ABA offered its own fraud guideline to the Commission.¹⁹⁰

¹⁸⁸ United States v. Emmenegger, 329 F.Supp.2d 416, 427 (S.D.N.Y. 2004).

¹⁸⁹ Felman, *supra* note 185, at 9. Mr. Felman further testified that the Commission’s proposed amendments fail to address the following shortcomings in the fraud guideline:

- Undue emphasis on loss
- Reliance on intended rather than actual loss
- The “piling on” of numerous offense characteristics that often overstate culpability
- The failure to include other factors that bear on culpability or render the offense less serious
- The “factor creep” from the three-fold increase in SOC’s
- The overly complex and overlapping nature of the guideline
- Limit the application of the victim table with a more nuanced approach
- Fails to reflect many mitigating culpability factors

¹⁹⁰ The proposed ABA guideline is attached as APPENDIX A. It resulted from a lengthy process when the ABA Criminal Justice section formed a special Task Force to draft a specific model economic crime guideline to submit to the Commission. *Id.*, at 11. The Task Force included “five professors, three judges, six practitioners, two organizational representatives, and observers from the Department of Justice and Federal Defenders.” *Id.* Mr. Felman summarized the proposed ABA economic crime guideline in his March 12, 2015, testimony at the Commission’s public hearing as follows:

Our Task Force Final Report reflects a proposed guideline that would accomplish the goals stated in our resolution. In particular, the Task Force proposal reduces the weight placed on loss, eliminates the use of loss that is purely “intended” rather than actual, and introduces the concept of “culpability” as a measure of offense severity working in conjunction with loss. Through the culpability factor, the Task Force proposal would permit consideration of numerous matters ignored by the current guideline, including the defendant’s motive (including the general nature of the offense), the correlation between the amount of the loss and the amount of the defendant’s gain, the degree to which the offense and the defendant’s contribution to it was sophisticated or organized, the duration of the offense and the defendant’s participation in it, extenuating circumstances in connection with the offense, whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense. The Task Force proposal also sets forth a more nuanced approach to victim impact, recognizing that in many instances the harm to victims is fully captured by

After the Commission sent the 2015 amendments to Congress on April 30, 2015, Professor Bowman also addressed the need to fix the fraud guideline.¹⁹¹ He viewed “the Commission’s ballyhooed multiyear study of the economic crime guideline...” as “fizzled” in light of their 2015 amendments.¹⁹² Bowman suggests setting a maximum limit on punishment for economic crimes, giving the loss table a “haircut,” and reducing the number, size, and cumulative impact of SOCs by (1) capping the cumulative effect of special offense characteristics, (2) reducing the number of levels assigned to many special offense characteristics, and (3) eliminating the sophisticated means enhancement.¹⁹³

V. OUR SUGGESTIONS FOR ADDITIONAL NEEDED REFORMS OF THE NEW FRAUD GUIDELINE

A. Introduction

Like the ABA, Professor Bowman, and others, we agree that the Commission’s efforts, while moving the ball in the right direction, did not go nearly far enough.¹⁹⁴ As our independent review of sentencing statistics and the results of our empirical study show, federal district judges usually choose not to follow the advisory fraud guideline, particularly in the context of mid-high monetary damage cases.¹⁹⁵ Perhaps more than anything, it is this data that sends the clearest signal

consideration of the amount of the loss caused by the offense, and that in some circumstances the nature of the harm suffered by the victims will be more significant than their number. Finally, the Task Force proposal would implement the statutory directive of 28 U.S.C. § 994(j) by providing an offense level cap where the offense is not “otherwise serious.

Felman, *supra* note 185, at 12.

¹⁹¹ Bowman, *supra*, note 81.

¹⁹² *Id.* at 270.

¹⁹³ *Id.* at 277-280.

¹⁹⁴ See e.g., Caruso, *supra* note 178 at 1,5; New York Council of Defense Lawyers, *Comments of the New York Council Of Defense Lawyers Regarding 2915 Proposed Amendments to the Sentencing Guidelines, Policy Statements, And Official Commentary* 2 (Comments before the Sentencing Comm’n, Washington D.C., March 12, 2015) (“The NYCDL believes that although the amendments currently being considered are a step in the right direction, further work is required to more appropriately reflect the culpability of individual defendants and to reduce the number of exorbitantly high advisory Guidelines ranges that arise in a substantial number of the cases.”) available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/NYCDL.pdf>. *Id.*; Families Against Mandatory Minimums, *Comments on Proposed Amendments to the Sentencing Guidelines*, 3-4 (Comments before the Sentencing Comm’n, Washington D.C., March 12, 2015) (“We were encouraged when the Commission commenced the multi-year review of economic crime sentencing. ... The few modest proposals to emerge from the multi-year study are, for the most part, fine as far as they go. But they do little to address the underlying problems we and others identified with the guideline.”) available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/FAMM.pdf>; Eric A. Tirschell, Vice-chair, Practitioners Advisory Group, *Testimony Before the United States Sentencing Commission*, 1 (Testimony Before U.S. Sentencing Comm’n, Washington D.C., March 12, 2015) (“Notwithstanding our continuing hope that ... in the near future the Commission will consider larger-scale revisions, we applaud the Commission for the proposals we are here to discuss today, which begin the hard work of moving forward ...”) available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Tirschwell.pdf>

¹⁹⁵ In fact, our study was conducted after the new Guideline proposals had been widely publicized.

that the Commission’s work, while laudable, falls short of the significant changes that are needed to restore the faith of judges, scholars, and commentators alike.

Our view that the amendments are a positive, but insufficient step, is well summarized by the submission to the Commission’s public hearing by the conservative Washington Legal Foundation (WLF): “While the proposed amendments are a modest first step in the right direction, the gravity and breadth of the problem demands a much more comprehensive solution.”¹⁹⁶ The WLF frequently litigates federal sentencing issues as *amicus curie*, “especially to oppose the knee-jerk application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences.”¹⁹⁷ We share WLF’s view that it and many federal judges, scholars, and practitioners have long argued: “that § 2B1.1’s narrow focus on monetary loss, when combined with the use of numerous overlapping enhancements (which are often an inappropriate measure of culpability) has resulted in unusually long sentences for first-time” fraud offenders.¹⁹⁸ However, our proposed reforms outlined in this Section go substantially beyond the comments of the WLF, and seek to address some of the clear sentencing problems that were revealed by our empirical study: too many SOC’s, a badly flawed loss table, an overly rigid and formulaic focus on victims’ harm, and an overused SOC for “sophisticated means” that has essentially lost its purpose.

B. *Trim the Fraud Loss Table*

We, like most of the groups and individuals that provided comments or testimony to the Commission, are also troubled by the guidelines’ overreliance on the amount of the loss. This strikes us as very similar to the drug guidelines’ overreliance on drug quantity, and may be the primary reason why the federal district judges in our study so commonly chose the exact minimum sentence.¹⁹⁹ This overreliance, indeed, caused one of the authors to publish an opinion on why drug quantity is not a good proxy for culpability.²⁰⁰ It also caused the Commission to pass the so-called “All Drugs Minus Two” amendment which reduced the length of drug sentences virtually across the board.²⁰¹ The vast majority of the comments to the Commission in the 2015 public hearing share our view that loss has the potential to seriously overstate criminal culpability because

¹⁹⁶ Washington Legal Foundation, *Comments of the Washington Legal Foundation to the United States Sentencing Commission Concerning Proposed Amendments to § 2B1.1 of the U.S. Sentencing Guidelines (Economic Crimes)* 1 (Comments to the U.S. Sentencing Comm’n, Washington D.C., March 12, 2015). *available at* <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/WLF.pdf>. The WLF, no stranger to the Commission, bills itself as a “public-interest law firm ...” that defends and promotes: “free enterprise, individual rights, a limited and accountable government, and the rule of law.” *Id.* at 2.

¹⁹⁷ *Id.* at 2. The WLF also publishes articles related to federal sentencing and has regularly submitted comments and testified before the Commission since the Commission’s creation. *Id.* The WLF also takes the Commission to task, and to court, for failing to formulate policy in a transparent manner. *Id.*

¹⁹⁸ *Id.* at 1.

¹⁹⁹ Our study parameters did not allow the judges to sentence below the minimum 151 months.

²⁰⁰ *United States v. Hayes*, 948 F. Supp. 2d 1009 (N.D. Iowa 2013) (Mark W. Bennett, J.) (Policy disagreement with the methamphetamine guideline because it lacks empirical support and drug quantity is a poor proxy for criminal culpability, establishing an across-the board one-third reduction in the sentence).

²⁰¹ U.S. SENTENCING GUIDELINES MANUAL, supplement to app. C, amendment 782, at 1306-1317 (West 2014 ed.) (All Drugs Minus Two amendment).

in practice it is not the panacea for culpability the guidelines hoped it would be.²⁰² These comments were nothing new because judges, lawyers, and academics have long argued for a reassessment of the inordinate reliance on loss as a sentence driver in §2B1.1.²⁰³ In our empirical study, the inexact dollar amount of harm highlighted the table's arbitrariness of a loss cut-off of \$7,000,000, representing the line between increases of 18 or 20 levels. In the case we presented, there is little reason to assume that one of the two enhancements is more commensurate with the crime than the other, or even as compared to a third option, for that matter.

One major advantage of the ABA proposed fraud guideline is that it not only gives the current loss table a “haircut” in Professor Bowman’s terminology,²⁰⁴ but a much needed “buzz-cut.” Professor Bowman recommends only deleting the top four levels of the loss table—which correspond to fifty, one-hundred, two-hundred, and four-hundred million dollars of loss—which only affected 56 offenders in FY 2012.²⁰⁵ We think this is insufficient, and our study (with an approximately \$7,000,000 loss estimate) and the federal district judges in our study appear to agree, at least in terms of their recommended minimum sentence.

The ABA proposal trims the loss table from sixteen loss ranges to six, and cuts the potential additions of up to thirty levels down to a maximum of fourteen levels.²⁰⁶ We note that the ABA was more concerned with the structure of the proposal rather than assigning offense levels, which was done simply to help in understanding its proposed structure.²⁰⁷ Thus, their suggested offense levels were indicated as “tentative.”²⁰⁸ The ABA Task Force conceded they had no empirical research to support their tentative offense levels.²⁰⁹ Thus, while we endorse the ABA’s effort to “buzz-cut” the loss table, without additional research and empirical data, we decline to endorse their “tentative” offense levels. We do believe they are on the right track as our empirical study indicates that federal district judges so overwhelmingly sentenced to the lowest level they could in the 11(c)(1)(C) range.

Further, many commentators and federal judges have commented on the harshness of the fraud guideline.²¹⁰ While we wholeheartedly recommend the ABA proposed structure of giving

²⁰² See, e.g., Washington Legal Foundation, *supra* note 196, at 1 (Criticizing § 2B1.1’s “narrow focus on monetary loss....”); National Association of Criminal Defense Lawyers, *NACDL Comments on Proposed Amendments for 2015 Cycle*, 8 (Comments to the U.S. Sentencing Comm’n, Washington D.C. March 12, 2015) (“Reliance on the loss table as a key driver of sentences in fraud cases has drawn widespread criticism from the bench and bar alike.”) (footnote omitted).

²⁰³ David Debold & Matthew Benjamin, Essay, “*Losing Ground*”- *In Search Of A Remedy For The Overemphasis On Loss And Other Culpability Factors In The Sentencing Guidelines For Fraud And Theft?*, 160 U. PA. L. REV PENNUMBRA 141, 141 (2011), <https://www.pennlawreview.com/online/160-U-Pa-L-Rev-PENNumbra-141.pdf>.

²⁰⁴ Bowman, *supra* note 81, at 278.

²⁰⁵ *Id.*

²⁰⁶ See APPENDIX A.

²⁰⁷ AMERICAN BAR ASSOCIATION, A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES FINAL DRAFT 9 (2014).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See Sandra D. Jordan, Fraud and Money Laundering - A Renewed Look at the Sentencing Guidelines: Part II, 17 White-Collar Crime Rep. 1 (2003) (“Prompted by the corporate scandals that gave rise to Sarbanes-Oxley, the Sentencing Commission was concerned that extensive and serious fraud be dealt with aggressively. The commission dealt harshly with those convicted of preciously unforeseen catastrophic

the loss table a “buzz-cut” we leave it to the substantial expertise of the Commission to gather the empirical evidence to support a new loss table. Indeed, the Commission’s current data already establishes that in the bottom half of the loss table (loss amounts of five thousand up to a million dollars), the percentage of within-guideline sentences was less than fifty-percent.²¹¹ Thus, contrary to Professor Bowman’s concern,²¹² the dissatisfaction with the harshness of guideline sentences are not driven just by the high-loss cases in the upper half of the loss table.²¹³ The conservative WLF told the Commission that “the fundamental problem in white-collar sentencing lies with the oversized role that loss *amount* plays in the loss calculation, a problem that remains wholly unaddressed by the Commission’s proposed amendment.”²¹⁴ **Our second reform proposal is to reduce the number of levels in the loss table and ask the Commission to determine the appropriate loss ranges and level increases based on empirical data they collect. The ABA’s proposal of six loss levels in the loss table may be a tad bit too few, but is much improved over the current sixteen levels.**

C. *Buzz Cut the Fraud Guideline SOCs*

We also remain troubled by the sheer length and complexity of the amended §2B1.1 fraud guideline.²¹⁵ This “super-sized guideline,”²¹⁶ as amended in 2015, runs twenty-three pages, including commentary; contains sixteen sub-parts in the loss table—potentially adding from two to thirty levels from the base offense level of six or seven; contains, in total, nineteen SOCs, many with multiple sub-parts (for a total of thirty-four sub-parts) and many of which read like a last minute special-interest rider to the U.S. tax code; and four complex cross-references.²¹⁷ It is clearly one of the most complicated and time-consuming federal guidelines to apply, and often results in lengthy sentencing hearings.²¹⁸ In the empirical study we employed, we attempted to avoid some of the more complex issues in the SOCs but, nonetheless, the SOCs (loss table arbitrary line drawn at \$7 million, abuse of trust, public company director, number of victims, etc.) almost entirely drove the sentencing range calculation.

We think one of the major structural flaws in the guidelines, in general, and the fraud guideline, in particular, is the rapid proliferation of SOCs. Increasing SOCs after the initial promulgation of the guidelines made some sense when they were mandatory, but most make little sense now. That is because either side can now argue any SOC-like characteristic that is in the case as part of the § 3553(e) variance portion of sentencing. For example, SOC 2B1.1(b)(14)

losses.”); *see also* Jamie L. Gustafson, Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers, 40 SUFFOLK U. L. REV. 685, 698 (2007) (noting that corporate officers can face “extremely harsh sentences, sometimes harsher than sentences for manslaughter”).

²¹¹ *See supra* Figure 3 and 3A; *see also* U.S. SENTENCING COMMISSION, *supra* note 121, at 7-8.

²¹² Bowman, *supra* note 81, at 278-279.

²¹³ Caruso, *supra* note 178, at 3.

²¹⁴ Washington Legal Foundation, *supra* note 196, at 3.

²¹⁵ Ellis et al., *supra* note 78, at 35 (“In short, the increasingly complex fraud guideline is rapidly becoming a mess.”).

²¹⁶ Caruso, *supra* note 178, at 1.

²¹⁷ U.S. SENTENCING COMM’N, *supra* note 111.

²¹⁸ *See e.g.*, Caruso, *supra* note 178, at 1; *see also infra* APPENDIX A, depicting our schematic diagram of a typical white-collar fraud federal sentencing.

involves a 2 level enhancement for an organized scheme to steal or to receive stolen vehicle parts like an auto “chop shop” mentioned in the application notes. This would be much better handled in the variance section, so that the scope of the “chop shop”, its criminal methods, and the entire range of its activities can be considered and factored into the appropriate sentence and not be limited to a 2 level increase. Moreover, why are stolen vehicle parts specially selected for a SOC? What about stolen anti-aircraft missile launching parts, parts for water processing plants, electric switches for nuclear power plants, or thousands of other products that create more of a national security problem? Moreover, why is this limited to “stealing” and “receiving”—wouldn’t a fraudulent scheme to manufacture defective anti-aircraft missile launching parts potentially cause greater harm?

This brings us back to the critically profound point that Professor Stith and Judge Cabranes made in 1998: “the Commission has never explained the rationale underlying *any* of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.”²¹⁹ In our view, most SOC’s unnecessarily complicate guideline computation with little corresponding benefit and most SOC’s have little or no empirical basis either for the SOC or the value assigned to it. We also find deeply troubling the extensive proliferation and potential “piling on” of SOC’s which can quickly drive a first-time fraud offender’s guideline sentence range higher than the sentence for a second degree murderer.²²⁰ Indeed, the Commission acknowledged this “factor creep” —noting that as more and more adjustments creep into sentencing it is increasingly problematic to ensure interactions between factors and their cumulative effect “properly track offense seriousness.”²²¹ **Our first reform proposal would be a comprehensive review of all SOC’s in the fraud guideline with the presumption that most should be removed unless there is solid empirical data to support it or a very compelling policy reason not to leave it to the more flexible § 3553(a) calculus.**²²²

D. Simplify and Modify the Victim Table

We also believe both the prior victim table and the one adopted by the Commission in 2015 overemphasizes this aspect of fraud offenses and unduly drives fraud guideline sentencing ranges higher than the acceptable range. The WLF advocates completely eliminating the 2015 amended victim table.²²³ This is no real surprise because they wanted to abolish the prior victim table because they feel that loss adequately reflects victim concerns.²²⁴ The ABA, on the other hand, suggested to the Commission at the 2015 public hearing a simplified victim table set forth below:

²¹⁹ STITH & CABRANES, *supra* note 105.

²²⁰ Bowman, *supra* note 81, at 278 (“First, virtually no one believes that financial fraud is worse than murder or treason, or blood-soaked bank robbery...”).

²²¹ U.S. SENTENCING COMM’N, FIFTEEN YEAR YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 137 (2004).

²²² Like the ABA, in its proposed fraud guideline to the Commission last year, we recognize that the fraud SOC’s must “be tailored to comply with specific Congressional directives to the Sentencing Commission.” American Bar Association, *supra* note 207, at 10. If too many SOC’s remain because of Congressional directives to significantly reduce the length of fraud sentences, we suggest trimming the amount of the level increase from 2 to 1 levels both for the most frequently applied SOC’s and, if necessary, reducing the level on the loss table from 2 to 1 to achieve more reasonable sentences.

²²³ Washington Legal Foundation, *supra* note 196, at 4.

²²⁴ *Id.*

(3) Victim Impact

(A) Minimal or none no increase

(B) Low add [2]

(C) Moderate add [4]

(D) High add [6]²²⁵

We find the ABA's proposal too subjective for judges to decide between the categories from Minimal to High. If there is no victim impact, perhaps two levels should be subtracted from the total offense level rather than, as the ABA proposal suggests, have no impact. We also find that the elimination proposal by the WLF of victim impact does not adequately reflect the non-overlapping aspects of loss and victim harm. Although we are sympathetic to their position that the victim table "makes arbitrary distinctions without an empirical basis" and that the loss table captures and punishes for losses suffered by the victim.²²⁶ Our nuanced difference in views from those of the WLF is that they believe loss "adequately" captures victim losses without the need for a victim table, while we respectfully disagree.²²⁷ Yet, we agree with Professor Bowman that the number of victims has assumed too much importance under the guidelines and that loss often correlates with the number of victims.²²⁸ Thus, we see the non-overlapping area between loss and victims as the severe emotional distress that may be caused in a fraud case. Current application note 20(A) (ii) suggests there may be cases where an upward departure for "severe emotional trauma" may be appropriate. Despite our view that there are too many SOC's, we do urge an SOC increase of 2 levels to the fraud guideline where one or more victims suffer "severe emotional distress" proximately caused by an offender's fraud conduct.²²⁹ Greater "severe emotional distress" than typical or in many victims could also be considered a variance under §3553(a). **Our third reform proposal would be eliminate the current victim table and replace it with a 2 level SOC where "severe emotional distress" in one or more victims is proximately caused by an offender's fraud conduct.**

E. Eliminate the SOC for Sophisticated Means

Even if our suggestion of presumptively eliminating most SOC's is not adopted, the Commission should eliminate the "sophisticated means" SOC in § 2B1.1(b)(10). While many commented to the Commission that this SOC should be eliminated,²³⁰ Professor Bowman, who originally advocated for it in 1998, has come to believe it "no longer serves any useful purpose."²³¹ As Professor Bowman points out, it applies in virtually every case where the loss is moderate or

²²⁵ See APPENDIX A

²²⁶ Washington Legal Foundation, *supra* note 196, at 4.

²²⁷ *Id.*

²²⁸ Bowman, *supra*, note 81, at 276.

²²⁹ The Department of Justice in their comments to the Commission recognized that "[M]any non-monetary harms can be equally devastating for victims" of fraud offenses. Department of Justice, Written Comments, 30 Comments to the U.S. Sentencing Comm'n, Washington D.C. March 12, 2015) (Comments submitted on March 9, 2015).

²³⁰ See, e.g., National Association of Criminal Defense Lawyers, *supra* note 202, at 12 (noting that this enhancement leads to "unprincipled double-counting, " and is "a paradigmatic example of the redundancy and ambiguity that plagues §2B1.1, and that it should be eliminated in its entirety.").

²³¹ Bowman, *supra*, note 81, at 280.

high and is also so often applied even in the simplest of fraud schemes.²³² **Our fourth reform proposal is to eliminate the “sophisticated means” SOC because it applies in virtually every case and is unnecessary.**²³³

F. Adopt a Departure for the Lack of Pecuniary Gain

We urge that the amount of an offender’s actual (or even intended) pecuniary gain needs to play a much more prominent role in the length of an offender’s fraud sentence. Currently, “gain” used in the fraud guideline “as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.”²³⁴ We argue that an offender’s “gain” is a much greater indicator of an offender’s culpability than the guidelines reflect. The ABA agrees, but suggests the fix is to add a five-level culpability SOC with multiple factors including “gain.”²³⁵ The problem we see with this suggestion is that it adds undue subjective complexity to an already overly complex guideline. While we prefer the ABA’s suggestion to the current exceptionally limited role of “gain” in the fraud guideline, we offer a simpler solution. We urge the Commission to adopt a downward departure for “gain” where an offender’s gain is substantially lower than the loss caused by the offender. The departure should be greater when the gain is smaller and greatest of all when an offender derives little or no pecuniary gain from the offense.²³⁶ **Our fifth reform proposal is for the Commission to adopt a downward departure to reflect when an offender’s gain is substantially lower than the loss the offender caused, with the largest decrease for offenders who derive little or no gain.**

VI. CONCLUSION

Contextualized against the near universal lack of faith in the Sentencing Commission’s approach to economic crime sentencing, and in light of the Supreme Court’s restoration of judicial discretion in sentencing in *Booker* and *Gall*, our examination has revealed that federal trial judges frequently sentence well below the fraud guideline. This resistance to the Guidelines has manifested likely because, as with a wide range of critics, federal judges lack sufficient confidence in the policies underlying it and the sentencing ranges it produces.²³⁷ Indeed, federal trial judges now follow the advisory fraud guideline range in less than half of all cases.²³⁸ Adding volume to the already existing chorus of dissent are the results of our original empirical study of 100 federal district court judges, and 240 judges overall, which showed remarkable minimum sentencing agreement among an extremely diverse group of judges, and that the desire for these minimum

²³² *Id.* Prof. Bowman has also pointed out that in high loss cases the SOC not only always applies but boosts an already to high sentence by 25%. *Id.*

²³³ See *supra* note 232 and accompanying text.

²³⁴ U.S. SENTENCING MANUAL § 2B1.1, Application Note 3(B) (2015).

²³⁵ See APPENDIX A.

²³⁶ Even the Department of Justice has observed that when loss greatly exceeds gain fraud offenders are likely to receive a below guideline sentence. HEARING ON PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES BEFORE THE U.S. SENTENCING COMM’N, 45 (2011) (Statement of Preet Bharara, U.S. Attorney for the S.D.N.Y.).

²³⁷ Caruso, *supra* note 178 at 1, n. 2 (citing the Commission’s own data).

²³⁸ U.S. SENTENCING COMM’N, *supra* note 112.

sentences largely overpowered judges' differences in sentencing philosophies such as retribution. Instead, it was the age of the judge and their support for mercy philosophies that drove agreement among judges and pushed these sentences down to the lowest levels possible. Indeed, three out of four district court judges sentenced the absolute minimum allowed of a 7-year sentencing range that was calculated by the Guidelines. Our proposed solutions, building on years of commentators' critique and criticism, are necessary steps not only in beginning to reconstruct an economic crime sentencing guideline that is consistent with the proper principles of punishment, but also can begin to re-plant the seeds of judicial trust.

APPENDIX A

Diagram Of A Federal Fraud Sentencing: **United States v. Nathaniel Kinnear**

Example: Defendant Nathaniel Kinnear is a 47-year-old white male who has pled guilty to securities fraud “straight up” (without a plea agreement or proffer).

Step 1: Determine the crime or crimes Kinnear pled guilty to or was convicted of.
E.g., 18 U.S.C. § 1348(2) (obtaining securities by fraud).



Step 2: Determine the Guideline applicable to the offense conduct pursuant to § 1B1.2 and Appendix A: § 2B1.1.




Step 3: Determine the base offense level. Use § 2B1.1(a)(1) because the offense is referenced to this guideline and has a statutory maximum of 20 years or more.
Base Offense Level: 7



Step 4: Determine the applicability of any specific offense characteristics. § 2B1.1(b) has 19 numbered subsections, with 34 subdivisions.
The loss is more than \$3,500,000, but less than \$9,500,00. § 2B1.1(b)(1)(J): +18.
The offense resulted in substantial financial hardship to 5 or more victims. § 2B1.1(b)(2)(B): +4

The offense otherwise involved sophisticated means. § 2B1.1(b)(10)(C): +2
The offense involved a violation of securities law by an officer or director of a publicly traded company. § 2B1.1(b)(19)(A)(i): +4

Total Offense Level: **35**



Step 5: Determine any Cross References.
§ 2B1.1(c).
None applicable.




Diagram Of A Federal Fraud Sentencing, cont'd.

Step 6: Determine all Guidelines adjustments.

Victim-related adjustments: Ch. 3, Pt. A:
None applicable

Role in the Offense, Ch. 3, Pt. B:
Abuse of trust. § 3B1.3: +2

Obstruction and related adjustments: Ch. 3, Pt. C:
Acceptance of responsibility. § 3E1.1(a): -2
Further acceptance of responsibility decrease requested. § 3E1.1(b): -1

Adjusted Offense Level: 34

Step 7: Determine Kinnear's criminal history category. Chapter 4.

Kinnear has a criminal history score of 0
Criminal History Category I. § 4A1.1;
Sentencing Table, Ch. 5, Pt. A.

Step 8: Determine Kinnear's Guideline range. Sentencing Table, Ch. 5, Pt. A.

Kinnear's Offense Level of 34 and Criminal History Category I yield an advisory Guidelines range of 151-188 months.

No

Downward.

E.g., for the defendant's extreme age or ill health. § 5K2.0.

Not applicable to Kinnear

Step 9: Determine whether any Guideline "departures" are appropriate: Are there features of Kinnear's case that potentially take it outside of the Guidelines "heartland" and make it a special or unusual case warranting a departure, as provided in Ch. 5, Pt. K, or § 4A1.3?

Yes

Upward.

E.g., for "substantial underrepresentation of criminal history." See § 4A1.3(a)

Not applicable to Kinnear

Diagram Of A Federal Fraud Sentencing, cont'd.

Step 10: Determine whether any “variance” from the advisory Guidelines range is warranted.

(a) “Policy disagreements”: Determine whether any “policy disagreements” with the applicable Guidelines warrant a “variance” from the advisory Guidelines range. *See, e.g., Spears v. United States*, 555 U.S. 261, 263-67, 129 S. Ct. 840, 172 L.Ed.2d 569 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. 85, 109-10, 128 S. Ct. 558, 169 L.Ed.2d 481 (2007).

Examples include “policy disagreements” with the “*amount of loss*” guideline, § 2B1.1(b)(1) the “*number of victims/substantial financial hardship*” guideline, § 2B1.1(b)(2) the “*sophisticated means*” guideline, § 2B1.1(b)(10)

Determine a “recalculated” Guideline sentence based on modification of the adjustments required by the Guidelines you disagree with.

(b) Section 3553(a) factors: Determine whether the seven factors in § 3553(a), including any “policy disagreements,” warrant a “variance” from the Guidelines range.

+

Step 11: Impose the sentence, either below, within, or above the advisory Guideline range, that is “sufficient, but not greater than necessary to comply with the purposes [of sentencing].” § 3553(a).

Impose a “below Guidelines” sentence, if a downward variance is appropriate.

Impose a “within Guideline” sentence, if no variance is appropriate.

Impose an “above Guidelines” sentence, if an upward variance is appropriate.

APPENDIX B

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA)
)
vs.) PRESENTENCE INVESTIGATION REPORT
)
) Docket No. 0862 5:14CR04476-1
)
Nathaniel Kinnear)
) Rule 11(c)(1)(C) Binding Plea
Agreement

Prepared for: U.S. District Judge

Sentence Date: April 1, 2015 1:30 PM

Offense:

Count 1: Securities Fraud
18 U.S.C. § 1348
0 years to 25 years imprisonment/\$250,000.00 fine

Release Status: Personal Recognizance Bond with Pretrial Supervision

Detainers: None

Codefendants: None

Related Cases: None

Identifying Data:

Date of Birth: August 20, 1967
Age: 47
Race: White
Hispanic Origin: Non-Hispanic origin
Sex: Male
SSN#: [REDACTED]
FBI#: 19765TD7
USM#: 13546-029
PACTS#: 112566
Education: Master's Degree
Dependents: None

Citizenship: U.S. Citizen
Country of Birth: United States
Place of Birth: Chicago.Ill.

Legal Address: 1206 Danburg Road
Chicago, Ill. 36076

Alias(es):

Alternate IDs: None

Height / Weight: 5'' 10'' / 170 lbs.

Hair / Eye Color: Brown / Brown

**Identifying
Marks:** None

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On January 24, 2015, you formally accepted the defendant's plea to count one of an Information charging Securities Fraud, in violation of 18 U.S.C. § 1348.
2. **Pretrial Custody/Release:** On May 7, 2014, the Court ordered the defendant released on a personal recognizance bond with pretrial supervision. There have been no violations of pretrial release.
3. **Summary of the Plea Agreement:** After reviewing the preliminary PSR you have accepted the parties Rule 11(c)(1)(C) plea agreement and are bound by their stipulated sentencing range. There are no contested guideline issues. The plea agreement provides that neither party will move for a departure or variance. The defendant has no prior arrests or criminal history record. The government believes the amount of the loss is slightly over \$7,000,000. The defendant believes the amount of the loss slightly under \$7,000,000. In lieu of contesting the amount of the loss, the parties' stipulated sentencing range is 151 to 235 months. This reflects the fact that it was impossible for either party to establish the exact amount of the loss. If the loss was \$7,000,000 to \$20,000,000 the guideline range would be 188-235; if the amount of the loss was

\$2,500,000 to \$7,000,000 the guideline range would be 151-188. Thus, the parties stipulated to a sentencing range of 151 to 235 months. You must sentence within this range.

4. The plea agreement provides for restitution of \$7,000,000 to Heartland.

The Offense Conduct

5. The defendant founded Ultra Yield Venture Group, Inc. (Ultra Yield), a corporation based out of Chicago, Illinois, in 2000. He was the sole owner and served as the Chief Executive Officer until it ceased operation in February 2013. The company was a private equity and business consulting firm, often investing in start-up ventures.
6. The defendant served on the board of directors for several companies, including Heartland Supply Corporation (Heartland) of Joliet, Illinois. The company designed and manufactured accessories for tractors and other farm implements. Heartland's stock was registered with the United States Securities and Exchange Commission (SEC) and traded on the New York Stock Exchange.
7. The defendant became a member of Heartland's Board of Directors in 2001. From September 2009 until his resignation on December 6, 2012, the defendant acted as the Chairman of Heartland's Board of Directors. During his tenure as a board member, the defendant exercised considerable influence over Heartland's management, recruited its president and chief executive officer (CEO), and directed and assisted the staff in preparing the company's public filings with the SEC.
8. Between September 2008 and January 2012, the defendant executed a scheme to fraudulently obtain money from Heartland. The defendant abused his position of trust within the company by persuading Heartland to give him money and stock under the guise that he was going to take the company private through a stock buyback. The defendant told management and board members that he and Ultra Yield would facilitate the entire stock buyback. On October 29, 2008, at the defendant's direction, Heartland began a complex series of money and stock transfers to the defendant through Ultra Yield for the stock buyback. Due to a significant computer failure at Heartland and a flood that destroyed backup records, both unrelated to the defendant or Ultra Yield, the exact amounts transferred are incapable of precise computation. Forensic accountants for Heartland, the defendant, and the United States each agree that the loss is between \$6,800,000 and \$7,200,000.
9. Neither the defendant nor Ultra Yield used any of the funds received to buy shares of Heartland's stock. Instead, the funds were expended on living expenses and various investments, including those in start-up companies.
10. **Loss amount:** between \$6,800,000 and \$7,200,000.

Victim Impact

11. As a result of the defendant's conduct with respect to Heartland, the parties have agreed to a restitution amount of \$7,000,000 to Heartland.

Adjustment for Obstruction of Justice

12. The probation officer has no information indicating the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

13. It appears the defendant accepts responsibility for the offense and, therefore, is eligible for a reduction for acceptance of responsibility.

Offense Level Computation

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

14. None

Adult Criminal Conviction(s)

15. None

Other Criminal Conduct

16. None

Pending Charges

17. None

Other Arrests

18. None

PART C. OFFENDER CHARACTERISTICS

19. The following information was obtained through an interview with the defendant. The defendant's personal and family data was corroborated by the defendant's wife, Ellen Kinnear.

Personal and Family Data

20. The defendant is one of two children born to Thomas Kinnear, deceased, and Ann (née Richards) Kinnear, deceased. The defendant's father passed away due to natural causes and his mother passed away due to cancer. The defendant's parents divorced when he

was a young teenager in high school. The defendant reported he had a good childhood and was raised primarily by his mother.

21. The defendant has one sibling, David Kinnear, age 51, a protestant pastor, who lives in Southern Florida.
22. The defendant was raised in Chicago Illinois. Presently, the defendant lives with his wife in Chicago, Illinois. The defendant and his wife are active in their Protestant church, Chicago Christian Church.
23. The defendant married Ellen (née Matthews) Kinnear on November 13, 1992, in Carmel, Indiana. The defendant's wife, age 44, is a physician. The couple has two children, ages 21 and 19. Both children are currently enrolled in college. The defendant reported and his wife confirmed that the couple had a good marriage up until the instant offense was discovered, but it has since been strained.

Physical Condition

24. The defendant reported he is in good health. He reported no history of serious illness or surgery.

Mental and Emotional Health

25. The defendant reported no history of mental or emotional health concerns.

Substance Abuse

26. *Alcohol:* The defendant began using alcohol at age 21. The defendant consumes alcohol one to two nights per week, but never to the point of intoxication.
27. *Other Controlled Substances:* The defendant denied the use of any other controlled substances.
28. *Substance Abuse Treatment:* The defendant has never been evaluated or treated for a substance abuse problem.

Educational, Vocational and Special Skills

29. The defendant graduated from public high school in Chicago in 1985. He was ranked 15th out of 639 students and achieved a grade point average (GPA) of 3.917.
30. The defendant obtained a Bachelor of Business Administration Degree from the University of Iowa in Iowa City, Iowa, on May 18, 1989. His GPA was 3.85.
31. The defendant obtained a Masters of Business Administration Degree from the University of Illinois in Champaign, Illinois, in 1994. His GPA was 3.79.

Employment Record

32. Since 2013, the defendant has been employed by Gold Coast LLC in Chicago, Illinois, where he has held the position of Vice President of Sales and earns \$10,000 per month.
33. From 2000 to 2013, the defendant was sole owner of Ultra Yield based out of Chicago, Illinois. He reported earning \$160,000 per year in gross income. This company is related to the instant offense and is no longer in existence.

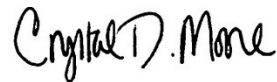
Restitution

Statutory Provisions: Restitution is mandatory in this case pursuant to 18 U.S.C. § 3663A. The parties have agreed to a restitution total of \$7,000,000.

PART E. FACTORS THAT MAY WARRANT DEPARTURES OR VARIANCES.

34. The probation officer has not identified any factors that would warrant a departure or variance from the applicable sentencing guideline range.

Respectfully Submitted,



Crystal D. Moore
U.S. Probation Officer

Approved:



Stacy J. Sturdevant
Supervisory U.S. Probation Officer